



JOINT LEGISLATIVE OVERSIGHT COMMITTEE ON JUSTICE AND PUBLIC SAFETY

December 12, 2013

Room 643 of the Legislative Office Building

The Joint Legislative Oversight Committee on Justice and Public Safety met on Thursday, December 12, 2013 at 1:00 PM. The meeting was held in Room 643 of the Legislative Office Building. Members present were: Representatives Boles, Burr, Daughtry, Faircloth, C. Graham, G. Graham, Hurley, McNeill, Stevens, Turner, Dobson, Speciale; Senators Bingham, Brown Goolsby, Randleman, Soucek, Woodard.

The following staff members were present: Kerry Guice, Debbie Holder and Joseph Kyzer, Committee Clerks; Kristine Leggett, John Poteat, William Childs and Lisa Fox, Fiscal Research Division; Hal Pell, Research Division; Emily Johnson and Sean Dail, Bill Drafting Division; Mary Jennings, Speaker's Office; Grant Brooks, Pro Temp's Office.

Representative Pat Hurley presided and called the meeting to order at 1:08 p.m. Chairman Hurley welcomed everyone and recognized the Sergeant at Arms Staff present, Garland Shepherd, Marvin Lee, Canton Lewis and Steve Wilson. She thanked Fiscal Research and Legislative Staff for all of their hard work. Senator Woodard moved for approval of the November minutes. The minutes were approved.

Senator Goolsby asked for follow up answers from the November meeting to be moved up on the agenda before we started losing our Senator members. He said the House members are pretty good about staying. Maybe after the crime lab annual report could we possibly move up before it gets too long in the tube and we lose our Senators it looks like the House members are usually pretty good about staying but before our Senators start filing out could we move up the follow-up answers from the November meeting? Then maybe we'll have more members here too but I'm really waiting here with baited breath to hear the numbers that we had asked for on some of those things particularly on ALE follow-up and some of the other stuff. That would be great if you would not mind.

Chairman Hurley recognized Judge Joseph John of the NC State Crime Lab to give his Annual Report.

Judge John's PowerPoint Presentation and Letter are attached

Judge Joseph John, Director, NC State Crime Laboratory: Members of the Committee, good afternoon. I'm very pleased to be here. I had lunch at a Chinese restaurant yesterday afternoon and received the following in a fortune cookie: nothing in the world can take the place



of persistence. So, here I am again to talk to you about the issues and problems facing the State Crime Laboratory. I very much appreciate not only the opportunity but your invitation to do so. Before I start let me say something that is very appropriate and I don't want to diminish its importance by relegating to somewhere in the presentation. I want to say thank you on behalf of the State Crime Laboratory to the members of the General Assembly. There was an appropriation in your budget last year which allocated us 19 new positions in the toxicology area. This is the analysis of blood for the presence of alcohol and/or drugs. This is an issue that is very serious in our courts, affecting our courts and the operation of the criminal justice system. I'll talk about how we're implementing those new positions in just a moment. But I wanted to start off by saying a very heart-felt thank you members of the General Assembly for recognizing that great need and that considerable issue. Well, let's see if I can get this right. All right, to sort of re-familiarize some of you perhaps as there are some new members of the committee, the crime laboratory has three locations in the State of North Carolina. The main facility is here in Raleigh and there is a regional laboratory in Greensboro and another regional laboratory located just south of Asheville in the Skyland community. At the laboratory here in Raleigh, this is a full service forensic laboratory. We analyze evidence in the digital areas, DNA, drug chemistry, fire arm forensic biology, latent evidence, toxicology, trace evidence. I won't explain what all those are. You can see what they consist of in your outline. At the regional laboratory in the triad, there are three forensic services offered the analysis of drugs, the analysis of latent evidence and the toxicology discipline. At the laboratory in Asheville we analyze drugs, firearms and tool mark work, latent evidence and some limited trace evidence in the fire and debris area. I've been asked well, as we'll see when you have these significant issues in particularly the toxicology area and the DNA area, why don't you have those disciplines represented in the Triad and the Western Regional Laboratory. Well, the Western Lab was founded in 1979, Triad Lab was established, Representative Stevens, in 2008. Both of those dates were before our old friends you've that heard be talk about, the June 2009 US Supreme Court decision in Melendez-Diaz vs. Massachusetts, which is significantly affected lab operations. Had we made the decisions today as to what disciplines would be located in these regional laboratories, obviously we would include both DNA, ah, a DNA presence in both labs and a toxicology presence in the Western Regional Laboratory. The legislation that you all passed in the last session will allow us to establish or begin to establish, at least a toxicology presence in the Western Regional Laboratory, so we are beginning to address that. There remains the issue of the DNA presence in both Asheville and in Greensboro. Why the decisions were made as they were back in 1979 or 2008, I don't know. My suspicion is, money probably had something to do with it. The instrumentation used both in the DNA work and in toxicology work is extremely expensive and again I don't know that that was the reason. I do know that certainly with the triad lab there was some solicitation of information or input from local law enforcements or that had something to do with the disciplines that were selected at the Triad Laboratory. Okay. What's been going on in the past year? The annual report you have which we were required by the last budget to deliver to the General Assembly on October 1st deals with the previous fiscal year. Some of the information I talk about today will be in the interim period as well. The most significant achievement of the Crime Laboratory in the, since I have been the Director, has been, ah, three years and three months, now, and still standing, since I have been the Director, has been the achievement this past year of the ISO/IEC 17025 Accreditation. ISO 17025 represents the



highest international standards and protocols applicable to forensic science laboratories and we are accredited under the auspices of ISO/IEC and have been since the middle of last year. We also have achieved 100% independent certification of our eligible analysts by an outside certifying agency. This is not something internally. In each of the disciplines, an independent test is required and our analysts were required to pass the test before the certification designation would be awarded. They use the word eligible, ah, some of our folks have not been practicing in the forensic science arena for three years. Most of the certifying agencies require a minimum of three years' experience before they will issue the certification. That being said, what we are beginning to do is have our new folks as they come in and complete their training, go ahead and apply for and take the test, get the test behind them and then at such a point they achieve the requisite experience requirement then they will be immediately eligible to receive their certification. The forensic science advisory board, well, let me go back to the accreditation just a moment. This accreditation was awarded by one of the national accrediting agencies forensic quality services and we are proceeding with a supplemental additional dual accreditation by Asflad Laboratory. They will be examining and visiting our laboratory in February of next year and presumably upon the completion of their visit or shortly thereafter they will determine if we meet the qualifications and we will become, if they do, the only, the only public laboratory in the nation, which is dually accredited by two separate independent accrediting agencies. That will be likewise a very, a very remarkable, remarkable achievement. All of these achievements and improvements on this particular slide are directed primarily at the quality arena. When I came to the laboratory in 2010, there was a joint legislative and public membership committee that was taking a look at the laboratory because of issues that had risen at that time and there was a definite focus on quality, quality issues. You can see three of these achievements improvements were required by special law passed back in 2011 by the General Assembly. Even though, I knew we had to address those quality issues first because that was the focus not only of this agency but of folks throughout the state, I was immediately aware that we also, in addition to the quality issues had substantial quantity issues. Not unless they had to prioritize and so we got these quality control measures behind us and now we're moving on. We'll talk a good bit more about the quantity issues today. Forensic Science Advisory Board composed of seventeen national forensic experts. They offer their collective experience as a compliment to the work of the laboratory. There is a letter attached to my to the copies of the power point representation, presentation, rather, that you have. We will talk about it in just a moment. It deals with the issue of compensation for laboratory scientists. The chairman at the conclusion of their two year anniversary issued a statement this past October and noted that, ah the laboratories achievement of certification for all its eligible examiners and it's attaining of international accreditation and he says that required and I mentioned this to you all, rewriting all the technical protocols, quality assurance documents and safety manuals in the laboratory. We have hundreds and hundreds of procedures. This was quite, quite an enterprise. And, ah we did accomplish that and we came into compliance with the international requirements and did receive the accreditation. And the chairman indicates that's quite a significant feat which did require and he said a great deal of time and commitment from the staff members to complete. But he also cautions that this is not a quick fix project. The laboratory needs a stable and increased work force as well as facilities which can accept increased capacity. Ah, and he understands, he says, this is not an economy where funding is an easy issue, but the safety of the citizens of North Carolina is not a small



matter, either. So, we have welcomed and appreciated the counsel and work of our Forensic Science Advisory Board. This past year for the third consecutive year, our forensic biology, the DNA section received a perfect audit from the FBI National DNA Index System Organization. These are rigorous standards achieving three perfect audits consecutively is again a remarkable achievement in the quality arena. And I put full time on-site lab legal counsel in the grouping under the quality matters as well. We are one of the few in laboratory, public laboratories in the country that has full-time, on-site, legal counsel in the building. Legal counsel is there available for discussion about any issue that may arise internally. She's also there and does a tremendous job in dealing with all representatives of criminal justice systems be it the law enforcement, the prosecutors, defense counsel, and so forth. I've said many times, I'll say it again, here, had the North Carolina State Crime Laboratory had full time on-site legal counsel in years past, chances are, I would not be standing here today as the Director of the laboratory because the issues that came to light would not, would not have occurred. Lean Six Sigma Project – I do want to take just a moment to dwell on this. I think this has been a significant first step in our internal efforts to address to what I call our quantity issue. Lean Six Sigma is a concept from the private sector. It's a, there are, it's a methodology, which was developed by the Toyota and Motorola Corporations, lean, using lean principles, that is, to remove the unnecessary, remove the unnecessary and six sigma concepts to improve the necessary, our scientists were successful in identifying potential avenues for shrinking crime lab processing time. As set out in the annual report, you can see that the forensic biology DNA section experienced a 50% reduction in case processing time during the first 5 months of 2013 utilizing this Lean Six Sigma methodology. The consulting forensic laboratory consulting agency came in and they showed by doing maps how much time and time and motion study, old things you've heard about for years, and you can see we were putting extra miles upon miles upon miles on our analysts that were totally unnecessary and we didn't take much reorganization to eliminate the bulk of those unnecessary motions. In the DNA data base section, they increased their processing time by 41%. Their goal for the 5 month period of the project was 25%. They reached 41% and reduced the pending number of arrestee and convicted offender samples by 67% and 47% respectively. That's what's in the report as of October 1st. As of today, I can tell you in the DNA data base section those folks are current. We are processing work as it comes in, in the door. It's a little easier in the data base as opposed to the DNA caseworks because the database folks are not typically called to court so they don't have to work in that court time variable which can be quite significant as we'll see here shortly. Case management guidelines, we modernized case management guidelines. This deals with the sequencing and structuring of our evidence intake. How we do that, bring evidence into the laboratory. We were the only, again, public laboratory in the country that basically took everything that was brought in the door, when it was brought in the door, and our Forensic Science Advisory Board came in and that was the first thing they said, said you cannot do business this way. This way of operating is unsustainable. So, what we have done is structure or sequence evidence intake. What that does, we limit to typically ten, ten items of evidence and there are several exceptions. We don't need to go into the minute. But there is some limitation upon the initial intake and then down the road if additional evidence is needed, then they bring it in. We're never going to turn evidence away. This is simply a structuring of how it's brought in, and what that does, is eliminate the tremendous road block when you get into a case working queue of a case that has cases upon cases and all of a sudden



you come into one that has 50, 75 100, 100 items of evidence. Well, that basically brings the whole section to a halt for a period of time it takes to work that particular case with all those items of evidence. So, this has been a tremendous assistance and again all these things, and we'll talk about more of them, are things I felt we needed to do internally to make the most effective and efficient use of the resources we currently have, so that we I come here and look you all in the eye with a straight face and say we need additional both human and other resources, I can say to you as well, we have done the very, very best we can with the resources we have been currently allocated. Another innovation, we are now deploying robotic technology in the DNA section. This is going to improve turnaround time to some degree in our electronic information system (forensic advantage). We have enhanced that system so as to improve communication, primarily with the district attorney's offices and those agencies bringing in evidence, and that again, has assisted in the processing and addressing the processing issues that we have had. We, you've probably heard me complain the past about the length of time it takes to replace an analyst, scientist who has left and we have addressed that to some degree by persuading OSP to allow us to continuously post vacancies. What that does, is it means we have an immediate pool of applicants to go to when a vacancy occurs, as opposed to what we were doing previously, which was a vacancy occurred, we had to post the position, and then go through, receive applications for that position, and whatever. So, we've cut out all that immediate early time and we have an immediate pool that we can go to. We also have a new associate classification for analysts, this is just under the Forensic Scientist I, and this allows us to hire folks right out of school as opposed to requiring folks to have 2 year's experience. We have found this to be frankly very beneficial because it allows us to do the training of the folks and they haven't picked up what some might call bad habits somewhere else while they got that 2 year experience, experience requirement. And I want to, yeah I mentioned lab legal counsel a moment ago, she arranged and hosted and we were the host agency for the West Virginia University Forensic Science Training Conference for Laboratory Counsel and a number, I attended a number of their sessions and I can tell you that we were the only agency represented that had full time on-site legal counsel and the lawyers who were required who worked for other agencies and who had to balance the needs of their laboratory clients with the needs of their other clients were very envious and said that was an absolutely an excellent system that we had implemented here in North Carolina. We did and now our procedures require customer satisfaction survey, got about 100 responses from representatives of law enforcement, DAs, defense lawyers, got some good positive responses including a substantial percentage indicating a high degree of professionalism among the lab staff and good interaction with our lab personnel and as well significant high percentage of affirmative replies to the question was the lab helpful. It comes as no surprise to you all, that the primary negative critique involved our processing turnaround time and the overall lack of manpower. If we could clean up those two issues our customers would be satisfied indeed and I think the surveys will indicate that. And I didn't want to leave the achievement improvement topic without mentioning session law 2013-171. Representative Stevens and Senator Newton helped to get this legislation through which addressed some basically work load issues in the laboratory without really affecting other areas and we're appreciative of their work and recognition in doing that. So that's all basically the good news. We go to the on-going challenges and these are not any different from what I have stood before you all and other bodies in the General Assembly before and talked about. Case submissions are



still extra ordinarily high, you can see the totals there and it may be of particular interest to you in that annual report what we did was include the total number of submissions from each individual county as well the number of items of evidence that came with those submissions and you can see that we're talking about 35,174 case submissions, that doesn't mean 35,174 pieces of evidence, it may mean two or three times that number of items of evidence which required independent analysis and work by our scientists. And of course, we've already mentioned *Melendez-Diaz v Massachusetts*, just to remind you very quickly, June 2009 decision the United States Supreme Court which says that under the confrontation clause of the United States Constitution when a forensic scientist has done analysis of evidence and seeks to present the results of that analysis in a criminal trial, that, that scientist much appear in person and present, these are the words of that decision "live testimony" in those cases. That's had just a devastating effect on the operation on the North Carolina State Crime Laboratory in particular and very likely of crime laboratory throughout the country. What it has resulted in, in the fiscal year 2012-13, as you can see, 2,822 hours of analyst time was spent in court time. The way I define court time is yes, the time actually spent in court on the witness stand, testifying, the time sitting in the court room waiting to testify, and more significantly, the time driving back and forth from the various laboratories to the courthouses throughout North Carolina. What that comes to is 70.55, five day weeks or roughly 1.36 I think it is years, years of analyst's time being taken up solely with going to court. Of those 2,822 hours, only 257 or 9% represent time actually on the witness stand in the court room, 9%. You can do the math when we go back to the number of case submissions, we, not counting the new toxicologists coming on, we have 124 case working analysts addressing those 35,174 cases and those 2, 3, 4 or 5 it may be that number pieces of evidence in those cases. Here's something that has come to the fore in recent years, really this past year I've been more aware of this issue than in past years and I've come to you all and talked about all the time we're spending on the road and not in the laboratory doing the case work. Case numbers are coming up, keep coming up and going up and going up and those are creating turnaround time issues, also affecting our turnaround time are attrition and non-competitive forensic scientist pay. And this ladies and gentleman, I again look you in the eye and say, we have done very well with the folks we have, what we are having is a significant issue with bringing in folks, what I call a revolving door. Bringing in scientists, going through all that process of posting, reviewing the applications, conducting the interview, making a selection, having them go through the background and polygraph investigation, finally hiring them and bringing them on and training them in the various procedures and I told you each discipline has hundreds of procedures, unfortunately we can't just hire somebody and put them to work. It doesn't work that way in forensic science. It may work that way in other types of organizations. We have to train them specifically in our procedures. Why do we have to do that? Because we are absolute required to perform those procedures with 100% accuracy. And you can't just walk in the door and learn how to do that with 100% accuracy no matter how smart and talented. And we have a boatload of smart and talented folks there. In fiscal 2012-13 we had 18, we lost 18 people. Nine, a full 50% of those on the exit interview, said they left for better pay. Those 18 departures represented about 10% of our workforce and that's unfortunately not an anomaly for fiscal 2012-13. I did the numbers essentially from 2010 when I first came to the laboratory to last month. We had a total number of 75 employee separations, 54 of those were scientist separations over a 3 year period. Fifty four out of 124 analyst workforce, you can do that math



as well. The exit interviews in the overall employee group, 75 indicated that 29 of them left for better employment, but when you focus on the scientists, 27, a full 50% of them left for better employment. And frankly, if you add that 27 to the 13 who either gave no reason or personal reasons which very likely they left for a better job, the percentage goes significantly higher. The issue with this is when those folks leave the laboratory it causes two devastating tracks, 1 – leaves a hole in that case workers queue and that hole isn't filled until we are able to bring in a new analyst which I've already told the process that we have to go through, we've managed to shorten that to some degree, but it's a significant period of time when that position is vacant and the work attributable to that position frankly isn't being done because there's no one to do it. Our folks work mandatory over-time on a regular basis trying to meet the challenges of the numbers and the attrition. But so few can only do so much. If you, I talked with our DOJ Human Resources folks and I don't say these numbers are 100% accurate, but I wanted to give you some idea of, I told you what the vacancies cost us, in terms of the operation of the crime laboratory. If you assume a two-year investment on the part of the laboratory, that's our work in going through the employing process, the training process, and development of a new scientist and then you add to that the cost of paying that scientist and other costs attended to the scientist, that comes to \$114,625, which basically walks out the door when a scientist leaves the laboratory. If you take just those 9 that we talked about in fiscal 12-13, that's over \$1 million. If you take the 27, these are just the scientists that have left, since January 1, 2010, that \$2,751,000. That's tax payer money that has basically walked out the door. If we received an allocation of \$2.34 million for salaries and new positions at the laboratory I can assure you, to increase the salaries, that, that number would be substantially reduced and the money would be much, much better spent. And to make sure that you all didn't think that these are just numbers and things that I'm making up or what have you, the Department of Justice conducted, sorry, authorized an independent salary survey of forensic scientists basically in the region in North Carolina, Virginia, Georgia, South Carolina and so forth. The overall conclusion of that study, we'll get into some of the individual numbers in just a second, the overall conclusion of that study was that the North Carolina State Crime Laboratory in terms of the salary structure and what it paid it's analysts was below the average minimum, maximum and survey total averages. We're below the board on any and every scale of measurement. Let's look at some actual numbers. This comes from the study. These are not my numbers. These are the numbers from this independent, independent study. Folks down in Charlotte, this is a local, locally funded county funded laboratory, they're Forensic Scientist III, the most experienced scientist positions, the equivalent thereof, they're up in the \$79,000 range. Our friends up in Virginia very close to that. Even here in Wake County, again a locally funded, not a state funded agency, they are paying the equivalent to our Forensic Scientist III roughly \$7,000 a year more. If you go the Forensic Scientist II positions, the numbers basically are the same and then getting into the starting range, notice that Wake County doesn't have a starting range or position equivalent to our Forensic Scientist I, that is basically their starting range there is 50. So what happens, is why these numbers are important is our folks who are coming in, trained, certified and are drawing the \$42,000 salary within a year or two suddenly become quite attracted to Charlotte or Virginia and can offer them \$20,000 a year more. We kept hearing that antidotaly, that I'm leaving for, and I'm going to get \$20,000 more. I found it truthful, I found it hard to believe that they could be doing that but there it is. That is indeed the truth. We're a training ground for Virginia and



Charlotte-Meck and our friends here in Wake County. Therefore my prior employee is working in the Wake County Lab. There is a locally county funded laboratory that is exclusively people by former employees of the North Carolina State Crime Laboratory. We're not losing them to California. We're losing them to here in North Carolina and Virginia because they're getting paid a good bit more and this is a serious issue and this revolving door is going to continue where we bring them in, train them, get them independently certified and then they move on. And that's just the slight truth of the matter. Okay, a couple of other matters before I leave the salary issue. Note there is a letter at the end of your copy of the Power Point presentation from our North Carolina Forensic Science Advisory Board which speaks to that issue. I'll just quote very briefly from the letter that retention, being able to keep the employees we have is a key part of reducing turnaround times and reducing pending case loads. That's not me saying that, this is the former Director of the Virginia State Laboratory and the other members of the Forensic Science Advisory Board, so this is a critical, critical issue for the North Carolina State Crime Laboratory. A couple more issues to quickly deal with before trying to give you an opportunity to ask some questions. In the session law budget 2012-142 Section 15.4, where North Carolina Justice was required to present a plan for a Western Regional Laboratory to be located on the Edneyville Campus of the Training Academy out there in Western North Carolina, we did present that plan. 36,000+, I've got an extra number there, sorry about that, 36,000+ square feet and that would include all the current forensic services and in addition add the critical services for Western North Carolina affecting a 36 county area for forensic and toxicology. If you remember that map, there was a whole area right there on there basically Statesville, west, all that area of North Carolina there's no toxicology or forensic biology service from the state laboratory in those areas. And so, as a consequence, all the DWI cases that are coming from Macon County, Buncombe County, you name it, those blood analysis come either to Green, mostly to Greensboro, also to Raleigh. The analysis is conducted and then when the case comes on to trial the analyst doesn't travel from the lab in Asheville all the way to Macon County or where have you. Has to travel from either Greensboro or Raleigh. Even from Greensboro, even Greensboro to Macon County, that's a full day. That's a day, out of the laboratory, and that is a day when that analyst is not doing any productive work in terms of attacking the large number of cases we have. So that's why that is and remains a significant, significant issue. We did submit the plan there's Edneyville and that's the aerial view of the Justice Academy and that's the bottom portion, I guess it would be your bottom left portion represents the site, the larger portion of this slide, you see where the facility is recommended to be located. In the most recent budget, a million four or so was appropriated to for Western Crime Laboratory planning and blueprint version and so forth and that is in progress and we will have that sometime after the first of the year. The money report associated with the budget reiterated the 1 million 4 planning money, did not mention any construction appropriation but did reference the earlier 2012 plan at Edneyville. Also in the continuation budget, the 19 new positions we've already talked about, let me tell you just a little bit about where we're coming on those 19 positions. We have identified in the hiring process an individual for every one of those positions. In some cases we're on number two and maybe even number three for reasons I'll tell you in just a moment. Five of the individuals either are hired or have a received or we have received a written approval for hiring, which is the final step in the hiring process. There are a couple somewhere in the process and then in regards to twelve of these applicants, as I said, we're either on number two or



number three. I can say that of those twelve, four declined the salary, four accepted another job, presumably better pay, and then four fell out in the polygraph stage. That's kind of frustrating because you tell folks there's going to be a polygraph; you're going to be asked questions. You know if there's something that's going to be an issue, let's get it out of the way now and for some reason that doesn't seem to happen until they get to the polygraph examination. So it's frustrating. But we're moving along with those positions. We are also looking at leased space in the Western Region, hopefully where we can accommodate all our services. We'll see how that plays out, in one location, to put in these new toxicologists primarily in the western area of the state, which as we were directed by the appropriations. We're also in the process of purchasing the instrumentation, which as I told you is not cheap and is required for them to be able to do their work and we will be moving along with that as well. Just a reminder, in our expansion budget request for fiscal 13-15 we did ask for DNA scientists and these would be primarily assigned towards the western part of the state and also including the Greensboro Regional Laboratory. Outsourcing, this was a provision in the continuation budget. We put together and issued an RFP soliciting bids for outsourcing that went out October 11, with a questions deadline extending it to the 18th and then the bid opening was scheduled for November 14th. Unfortunately, we didn't receive any bids. We're studying that, looking into terminology in the RFP with a view towards reissuing it. That's more with DOJ at this point than the crime laboratory, particularly. But, we are exploring reposting that RFP presumably with some modifications. That being said, in 2012, at that time, I think we shared it with your RFP folks. We received some informal information from agencies and unfortunately there's no agency located within North Carolina that, at least, of any size that can do toxicology exams and that creates an issue that I'm going to talk about in just a second. The information we received, sort of informal proposals was that the analysis work itself, taking the sample in, doing the testing, and getting the results, that ran between about \$110 to \$150-\$160 a sample which is not extraordinary but at least it was reasonably consistent. The problem came in all of these proposals when they realized that not only was the analytical and scientific work required but what was also going to be required, this may have affected why we didn't get any bids, I don't know, that's speculation on my part, but it was going to require the analyst coming to North Carolina to testify and these are DWI cases, typically not only in the Superior Court but in the District Courts throughout the 100 counties. And those testimony costs varied. They ranged from \$3,200 a day including expenses to \$1,500 an hour up to, I'm sorry \$150 an hour up to \$1,500 a day not including travel, subsistence and other expenses, and then one had a flat rate of \$4,500 per testimony required. Those probably were the market numbers back in 2012 but I can only speculate what the market numbers are today and what might show up in our RFP should we get any proposals when and if it's reissued. But I expect they'll be in that general range, so you do the math, let's say it's a hundred cases in testimony and the analysis is required to be at \$110 per analysis, that's \$110,000 right there just to do 100 cases and that doesn't include any money to permit the analyst to come to North Carolina to present testimony. You've heard those numbers, so it's an interesting area, it may be a helpful area but it's going to take a continued look. We also in the budget, we've been a little more successful in this regard, outsourcing by the district attorneys to local hospitals and I saw Peg Dorer here a moment ago, yeah, Peg. Peg Dorer with the DA's Association and our Lab Legal Counsel have worked together very, very well trying to implement this project and to Peg's credit, they, the District Attorney's Association has taken the



position that they are not going to send a case out for outsource work if it's already been completed and in requiring verification from us and from the Crime Laboratory and from the local District Attorneys that the case indeed is still pending before they send it out for analysis. In that process, we have uncovered a number of cases which we've learned for one reason or another, the message has not gotten to us that the case has been concluded. There's over 2,000 of those cases that we've identified between Peg's work and the Lab Legal Counsel's work. And that's cases in which we would have unfortunately gone ahead and done unnecessary analysis or analysis that was no longer needed. That's been a very successful project jointly undertaken and we compliment the DA's Association for their work in helping in that regard. Between that project and the Lean Six Sigma Project, I can tell you we have reduced the number of pending case inventory in the toxicology area by approaching 3,500 cases. We're working all of these things in combination are attacking the issue, but the bottom line issue is the numbers are just so great that we cannot deal with those numbers effectively and efficiently with the current resources. Then lastly, a couple more things. The State Crime Laboratory was transferred out from under the State Bureau of Investigation and now we report directly to the Attorney General. That was accomplished fairly effectively. That was a long term relationship, going back well, yes, to the beginning of the SBI in 1937 more to the '50s, so it was a long term relationship and there were a number of issues involved in effecting that separation. We dealt with a substantial number of them in a memorandum of agreement between the laboratory and the bureau. Whether we thought of everything possible, probably unlikely and there will be things that come up from time to time that we will have to resolve. But it was done in a spirit of cooperation under the auspices and direction of the Attorney General and has worked remarkably well. DA training we mandated to give DA training and report on the development of the program. Our report was returned to the General Assembly, which indicated that the report indeed is not only been developed, it has already been conducted and Senator Goolsby, Representative Stevens, Representative Daughtry, there were a number of other lawyers here. I can tell you that, that identical program voluntarily is going to be presented on January 17 for defense counsel under the auspices of the School of Government and Indigent Defense Services and so if you haven't signed up yet, Representative Stevens you need to get your application in. But that's something we've taken on, I think that's a reasonable and appropriate use of our resources, not only to educate if you will, as you all intended District Attorney, District Attorney's processes of the laboratory, but also defense counsel as well. Annual Report, I was required to present one. You got it, we did it. Bottom line, where is the, that's the bottom line on the slide there. Pretty good year really overall for the North Carolina State Crime Laboratory. Significant number of achievements particularly addressing as I said the effective and efficient use of our current resources. Are we out of the tunnel yet, no, but we maybe we can see the end of the tunnel down the road at this point. I'll be happy to try to respond to any questions that you all have.

Chairman Hurley: Thank you Judge John and as you answer the questions be sure to speak into the microphone. You may already know that but it does help eventhough we may be behind you talking you can answer straight ahead. Senator Bingham.

Senator Bingham: Thank you Madam Chairman. Judge Johns does any of the schools systems in North Carolina have, I'm referring to High Schools, do they have opportunities to come and visit your lab? The reason I ask, it seems that it would inspire a lot of interest in this field and I know now today that this day in television and all the CSI programs there seems to be a lot of



interest it may give you an opportunity to recruit a lot of bright shining stars in science in that type of field. I just wondered if that's a possibility.

Judge John: Short answer, Senator Bingham, is yes and those, we do tours on a regular basis and they can be arranged by contacting Jennifer Councilman who is my secretary, executive secretary in my office and we try to work those out. Understand the tours are conducted by a lab scientist, so they are taking time away from their other work to do that, but I think it's a, as you suggest, a valuable endeavor. One thing I didn't mention in the report was that we are conducting, have been with the help of folks of the Indigent Defense Services so forth, tours of the laboratory for defense counsel. They'll come in and think, frankly have had in many respects, had their eyes opened to what the issues number 1, are we the laboratory and number 2 with the really effective and highly critical and technical capable work we do in the laboratory.

Representative Stevens: I'm glad we've been able to help you with the Melendez-Diaz matter but have we looked any further at video conferencing or remote testimony whether that will help save?

Judge John: Yep, and I and Joy Strickland who is our lab legal counsel, we monitor that process and those decisions throughout the country. Short version and I don't want to take a lot of time; the courts have interpreted the words present live testimony in Melendez-Diaz decision to mean the body has to be there. That is generally throughout the country. That is the position the courts have taken. You all can say, my goodness this is the twenty-first century and multi-million dollar corporations do business by Skype and all the various other means of electronic communications, why in the world isn't that good enough for the court system and you have to ask Justice Scalia that question because I don't know the answer. That being said, we are still looking at different proposals, perhaps limited to the district court to address some of the issues, their thought being that if there is constitutional error, there is, I'm talking basically to lawyers here, there's an automatic right of appeal for trial to no superior court which might address any constitutional error that occurred in the district court trial. That counsel and I have discussed and we'll probably be talking to some of you about perhaps putting it up on a pilot program on a notice and demand basis, where similar to the other statutes, where the district attorney gives notice that he intends in case x, y, z to present testimony of the evidence by means of teleconferences, Skype, what have you and that if the defendant objects, he needs to say so now because otherwise that objection would be waived. That might address some of the constitutional issues. So we haven't given up. Short answer, Representative Stevens, we're still looking, because that absolutely makes imminent good sense in the twenty first century.

Representative Dobson: Thank you madam Chair. I have three counties that would be affected by Western Crime Lab so I have a few questions on that if I can to try to put the pieces together to help me understand this. First, the Melendez-Diaz case, the back log that that's created particularly on DWI cases, is it fair to say that, that has created a significant back-log in the west in particular?

Judge John: It affects the west, just for the reasons I discussed earlier because we do not have the toxicology analysis presence there in the Western Laboratory so that the analysts coming to court as required by the Melendez-Diaz must come either from Raleigh or from Greensboro, I don't know which of the three counties are yours but to any of those three counties and all the other counties, 36 counties in the western region, so that puts a substantial burden on the time of the analyst. Our analysts are typically subpoenaed to 5, 6 up to 10 different courts on a daily



basis. We have a full time person that just tries to keep track of all those court appearances. So, that's why we're continuing to look at some of the electronic alternative, but have not frankly gotten any encouragement from the court decisions throughout the country.

Representative Dobson: The 19 positions that were allocated that you talked about earlier, are several of those resources going to the west? Will that and also you talked about the outsourcing of the DWI cases to hospitals, just to make sure I'm on the same page, will those two things help with that back-log or is that totally unrelated?

Judge John: No, they are related. And I'm confident it was the intent of the General Assembly when they allocated those 19 positions to us, in fact they said so in the Appropriations language that this was to primarily to address or to help the western counties. So, we intend to implement a toxicology presence in the Western Regional Laboratory wherever it may be located. It will probably be in Asheville for the foreseeable future until such time as be a capital appropriation and construction of the new facility, but we will have them there, yes and that will help, I don't know what effect at this point, it's hard to say what effect the out-sourcing to the local hospitals may have. We are working with two or three jurisdictions, prosecutorial jurisdictions in arranging to have some cases transferred from the laboratory to the local hospital. And it will eliminate the great travel time for the analyst, whether that's going to be a speculation at this point, whether that going to be commiserate with hospital schedules and operations and so forth, I have no idea. So, I've kind of got an open mind and a wait and see attitude on that out-sourcing. But the new positions have got to help. That's what I just preached here today, I think we need more folks because the numbers are such not with-standing that we're doing as well as we can with what we've got.

Representative Dobson: Thank you. One more follow-up. How will, if we were to allocate, I'm not suggesting that we will, we'll see how that plays out in the end, but the \$16 million new construction facility that you talked about in here. How would all of that fit together with the new positions, the out-sourcing and a new \$16 million facility? Can you talk just in general terms and maybe specifically to how to make me understand so when I go back to my people how that's going to make it a better process, how it's going to make it a more efficient, and cut down on that back-log, in my three counties?

Judge John: Well, first of all, a permanent facility, a newly constructed facility is down the road even if you appropriated the \$16 whatever it is million dollars today and we began construction today, that's still two or three years down the road before that has any effect. That being said, it would permanently and it is permanently locate toxicology and as well as the DNA discipline in western North Carolina, so as to allow local access by your law enforcement, counsel both on the prosecution and defense side without having to come to Greensboro or Raleigh in those cases. And then whatever limited degree the hospital out-sourcing reduces the number of cases coming to the crime laboratory, yes that may have some impact as well. I don't know if I'm answering your question or not. I've done as best as I could, as best as I understood your question.

Representative Dobson: I think that helps me understand that it's kind of in the direction that we need to go. How the positions affect it and the out-sourcing and the new construction and that's something I certainly want to keep working towards and hope to work with in the future.

Judge John: It brings the crime lab a whole lot closer to, at least in those particular disciplines to your counties than it is right now.



Representative Dobson: Thank you Madam Chair.

Chairman Hurley: Right and Judge John will probably be around a little bit afterwards if you need to talk to him. OK, Representative McNeill.

Representative McNeill: Thank you Judge John for your presentation. I have two questions, neither of which are really related, but anyway. You did a really good job on explaining your turnover and everything like that but I had a follow-up question with that. These people that are leaving, are they leaving like in the first year to two, year two to four, after five years, so forth? And if you can answer that, then I have a second question.

Judge John: Generally speaking, and I don't have the numbers in front of me, but my gut is they are leaving in the earlier years and it's for the reasons I showed you that come in, we go through all the process of the hiring and the training and getting them independently certified but they're still at our basically \$41,000, \$42,000 range and the folks right next door at the Wake County Forensic Laboratory can offer them \$15-\$20,000 a year more and these, all they have to do to go to work is go to the next drive way because they're located right next door to us out there in Garner and more importantly and this addresses your question to some degree, for these folks, typically the 2-4, 5 year employee are younger folks who are newer to the laboratory, they're raising families and it's significant for the analyst that when she goes to court, she doesn't have to go to Macon County or Dare County or where have you. She goes right downtown to the county courthouse here in Raleigh, sits and waits, does the testimony and goes back to the laboratory also located here in Raleigh and doesn't spend the entire day plus, plus, plus traveling and being away from family and children and so forth and my having to pay overtime as well as far as that goes to go to these out-lying counties. A long answer to a short question. Sorry.

Representative McNeill: So, it seems evident then from your comments that it's not too hard to get them in the door it's just hard keeping them there. So if we had some kind of career ladder or something like that would possibly help. But anyway, to my second question. And you touched on this just briefly, I know back this summer ya'll recently submitted your all new list of guidelines for evidence submission. How have those been received? I have gotten some feedback on it. I think you touched on it briefly a while ago when you said had limited some of the cases to ten items. Has it been received well out there by the agencies? I know when you're talking about a complicated murder case, it's limited to necessarily the ten items it might cause some problems.

Judge John: Well, first of all. We can get into the nitty-gritty, maybe individually, but there, that's, there called guidelines. We used that word advisedly, it's not rules or policy or what have you. When you get the exceptional case, with upon consultation between the agency and the laboratory it may be that a substantial number of items or more items than ten may need to be received at the initial submission. Our lab counsel, who I mentioned does a great job in talking with DAs and agencies and saying, looking through and it's amazing if you take a little bit of time right there up front in the agency, the investigators look at it, the DA looks at it and our lab lawyer says well here's what we can accomplish reasonably quickly and they say well you know what, we really don't need these 20 other things, we're simply trying to do everything possible. We really don't for purposes of prosecution, we don't really need those 20 other items. So, it's a, it does involve some communication. I keep telling my folks communication a wonderful thing. And it does involve some communication. I'm trying to answer your question. We did some out-reach prior to implementing the guidelines and yeah, there was some concern and I



understood that coming particularly from the law enforcement agencies. They understand the intent and the process and they understand that it's not rigidly enforced if there's a justification for the guideline to the number to be exceeded that we're going to accommodate that. So it hasn't been an issue. I'm knocking on wood.

Senator Brown: Thank you Madam Chairman. Judge John great job. I may get staff or Representative Burr to help my memory on this but I think in the budget this year there was a small amount of money that was put in the budget to help look at salaries that were really out of line with the market. And if I can remember right I think it was about \$10 million that the Governor had discretion to take a look at that. My question is, have you taken a look, have you relayed this concern to the Governor's Office, have you possibly tapped into those dollars?

Judge John: The short answer is yes and we did this through the Department of Justice and the Department of Justice although it has other agencies besides the Crime Laboratory, placed our, their recommendations for a salary adjustment for the Crime Laboratory at the top of their list. We're still waiting I guess as everyone else is for what the results will be in their determinations. We're hopeful.

Chairman Hurley: Follow-up? Are there any members of the committee, any other ones who have a question? I have several. Going back to page 3, where you mentioned 100% forensic scientist certification and you said you were doing a dual certification, how much and what advantage is that and how much is it costing, and how much did the other one cost? Do you know?

Judge John: We need to be clear and the terms are confusing. The accreditation applies to the laboratory. Certification applies to the individual analyst. It is two separate and independent processes. The certification, yes there were some costs attending to that and we continue to be as our folks come on line and become eligible to be certified off the top of my head, unfortunately, Madam Chairman I can't give you those numbers. The accreditation process for the laboratory, this goes back to the dual accreditation, the primary advantage, quite frankly is resolving any lingering concerns that were present very strongly as I eluded to in 2010 about the quality issues at the laboratory. If we can say and stand up and say and it's about 30,000+ Madam Chairman, say that we are dually accredited by 2 separate accrediting agencies who have come in and looked at our procedures, our policies, our operations and given us a seal of approval, I feel like that the first part of my task, that is addressing the quality issues will be definitively accomplished. And that's the primary advantage, Madam Chairman.

Chairman Hurley: Who would know this and who would be interested that you're having two, a dual accreditation? What is it going to do for our state, how is it going to help our state?

Judge John: It will, the advantage as I suggested is that any citizen that comes into contact with the court system can have not a single assurance but a double assurance that an agency, an independent agency has come in and looked at the operations, the procedures, the policies and they spend about 10 days when they come through and go through every procedure, every operation, every policy and so forth, they can have the assurance that these two groups have come in given their seal of approval to the operation of the laboratory and that whatever lingering issues that arose in 2010 which quite frankly dealt with cases back in the late '80s and early '90s not operations in 2010 but that's neither here nor there, I guess. But they have that confidence. I believe it's worth it Madam Chairman there certainly is room for difference of opinion in that regard.



Chairman Hurley: Well I would think one accreditation would be, would we be the only one in the nation or does everybody do that?

Judge John: No ma'am. It would be a singular mark or achievement, if you will, for the North Carolina State Crime Lab.

Chairman Hurley: Okay. And you don't need authorization from us?

Judge John: No ma'am. That being said, I guess. The contrary would work. If you said, don't do it, I guess that would take care of it.

Chairman Hurley: Well I was just thinking \$30,000 for a second accreditation is our tax payers' dollars could pay for salaries, that's my point. Okay, Representative Stevens

Representative Stevens: Thank you and just a couple of follow-up questions or comments. One, I think the second accreditation you use is the more rigorous accreditation, is that not correct?

Judge John: I think for our purposes and the purposes of discussion here, I don't think you could quantify one or the other more or less rigorous than the other. Many, many laboratories in the nation are accredited either by Forensic Quality Services or ASCLD Lab and they operate as if and are indeed fully accredited so I don't think that would be appropriate to try characterize.

Representative Stevens: Follow-up. And with the committee that we, that was investigating the problems in the lab, did they not mandate a particular lab accreditation?

Judge John: We're going back some, there were concerns raised at that time concerning one of the accrediting agencies and you will note that the accrediting agency that we had initially gone to is not that accrediting agency.

Representative Stevens: I just want to say I did go tour the lab with you when it was first opening in 2008. I will say to the committee and everyone that you have done a tremendous job trying to remove that black eye that was caused by a very, very small margin of cases and I appreciate all the hard work that you've done. That being said, I know we've had quite a back-log for a while with lab cases, court back-log, you said 3,500 cases were taken out and done privately. How has that improved the back-log? Can you tell us in months?

Judge John: I don't know if I can quantify it in terms in months. Let me be clear. The 3,500 cases I'm talking about were an improvement in our processing time as well as a result in our internal Lean Six Sigma Project and as a result of the cooperative efforts of the lab and the District Attorney's Association in identifying cases still in the laboratory which did not require, did not actually require testing. So that's where the 3,500 number came from. Obviously you take away 3,500 from 8 or 9,000 whatever it was prior to that, yes that's going to make a difference. That's common sense. I'm glad you reminded me of that. I meant to mention this earlier, that you had visited the lab and maybe one or two others had. We're here in Raleigh you all are here in Raleigh. I would invite you or if you would prefer, those of you from the western region in Greensboro, if you wish to visit the laboratory, I would encourage you to do so. As with I said Defense Lawyers who have visited and gone on one of our tours, we've had prosecutors come and learn some things by going on our tours as well as the folks from the schools. I would invite you to call my office and we can set you up with a visit. We can do the short version or we can give you the two day version. So, if have a little time I really encourage you to take me up on the offer.

Chairman Hurley: We plan to do that. Okay. I have one more about turn-over. Do the employees, when they are doing this. Do they know that they have benefits, the benefits they



have as state employees and do the other places that they're going have the same benefits? And should we just start giving a salary and let them get their own benefits?

Judge John: Those are policy questions and issues perhaps not ought to be directed to the Crime Lab Director.

Chairman Hurley: But do your people consider that?

Judge John: The agencies that were represented in the salaries stated while I don't know for a fact, I'm assuming the Virginia Department of Forensic Sciences as well as the Wake County facility and the laboratory down there in Charlotte-Mecklenburg. I'm assuming they have some sort of insurance and other packages available. I don't know that for a fact. I feel reasonably confident without fear of contradiction about Virginia and just don't know about.

Chairman Hurley: But my question is when they're leaving, do they realize that those count a lot of money also. Are they asked that or given that information?

Judge John: Yes ma'am and of course they get that information when they come on. They know they're getting benefits and you, and we are in the business, unfortunately of interviewing folks on a regular basis and I can assure you that's very high on the minds on any of the folks coming in that are seeking these positions is what are the benefits... what benefits are available? So at least the job applicant in our particular profession, the job applicants are pretty sophisticated, Madam Chairman and they're certainly aware of benefits.

Chairman Hurley: Judge John, Representative Boles has a question, welcome.

Representative Boles: Thank you, Chairman, I apologize. Just two questions. We have how many different crime labs are in the State of North Carolina? I see you have Charlotte, Wake.

Judge John: There are a handful, Representative Boles.

Representative Boles: Ten?

Judge John: I'd be hesitant to give you a specific number. That's probably not far off one way or the other. What I would caution though, that we understand that most if not all of these laboratories, including the one here in Wake County are not the full service forensic science laboratory that we have in the state laboratory. They are limited to particular probably in their area's high volumes.

Representative Boles: Okay, and thank you and just to follow up and that Madam Chairman. Are they overwhelmed with cases like you all or do you subcontract some of your cases with them or could we for the non-complex cases, I assume as you'd talked about and I understand the complexity of your state lab?

Judge John: Similarly to the discussions we've had with two or three of the prosecutorial districts about transferring some of the toxicology cases for analysis in their local hospitals short answer to your question, yes if the submitting agency desired, that's our customer, they've submitted the evidence to us to be examined according to our standards, if they desire to withdraw the evidence from us and send it somewhere else there's, we would have no reason to attempt to interfere with that. But it would have to be at the initiative of the submitting agency because, as I said, have expressly and wisely submitted the evidence to be analyzed according to our standards not somebody else's.

Representative Boles: And just a follow-up. Would the money, would the money follow the child?

Judge John: I'm assuming none of these facilities would do the work for free.

Representative Boles: I mean would it come out of your budget?



Judge John: Again, that would be a decision I guess you all would have to make. If you were going to allow that type of transfer like you did with the hospitals, I guess there would have to be some appropriations to incentivize local law enforcement agencies and prosecutors to want to move the case. There's not any, again we're talking primarily in the toxicology area, I'd be very reluctant to suggest that we look at any of the other issues.

Representative Boles: Right, I don't think they would want the capital. And one other follow-up if I could. In the last year's session we divided your budget. You have your own separate budget item, separate from the SBI and would you, you may have already commented on it. How's that going? Have you found some money?

Judge John: I did comment briefly. We've come to a memorandum of agreement with the SBI as to various what was previously joint functions and worked through that. The SBI budget obviously has been reduced by the amount which was attributive to the State Crime Lab and that's been done by the Department of Justice and that's, and I don't see that that has been an issue at least to this point. Which is not to say that it was an adequate budget to begin with but it, they just took out of our budget and appropriated it.

Chairman Hurley: Seeing no more hands, thank you so much Judge John.

Judge John: Thank you so much. Hope you all have a pleasant holiday.

Chairman Hurley: Okay, now we'll have our committee discussion about questions from the last session and we've got everybody still here.

Kristine Leggett from Fiscal Research had packets prepared and distributed of the follow-up questions from November 14, 2013 meeting (see attached)

Kristine Leggett: Thank you Madam Chair, Kristine Leggett, Fiscal Research. In your packets at the very back you have a document that looks like this and says follow-up questions from the November 14, 2013 meeting. The first question that we've provided a response to was I believe from Representative Boles, how much money has ALE expended through federal Seized Assets Program in the past five years? So I have given you a chart here that's got their expenditures since 2005-06 and you can see on there in FY 2012-13 they expended about \$500,000. What's been purchased typically, ALE has used the funds to buy equipment, ballistic helmets, duty belts, air cards. The years where you see the \$2.5 million 2010-11, I believe also in 2009-10 they bought vehicles and they've also used the funds for covert operations and training. In the current fiscal year the only report that we've received on the expenditures of seized asset funds is \$400 that they are transferring to their operating budget for gasoline. And there is currently \$2.8 million in their seized asset accounts and that's as of yesterday.

Senator Goolsby: What is the controlling authority for the spending of that money? Do we control that or it's up to them to do what they want to with it?

Kristine Leggett: Senator Goolsby, there are Federal guidelines governing the expenditure of those funds that prohibit it from being used for ongoing personnel costs and some other things but for the most part it is up to them how they spend it as long as they are within those federal guidelines. They are required to report to you all, to Gov-Ops when they are making expenditures from those funds.

Senator Goolsby: So I'm to understand that all these seizures are via the federal fair share programs so the money did not go, it was diverted from going to the North Carolina Public Schools?



Kristine Leggett: Yes sir. The federal agencies at some point were involved in these cases.

Senator Goolsby: If I may remark on that Madam Chairman. I, just so all the members understand, under our law in North Carolina, if it's seized by the state all the money goes to our school systems. If it's seized and goes through the federal authorities they keep about 20% and give 80% back to the agency that makes that referral, diverting that money from our school children so that they can have cars, gasoline, automatic weapons, all those kinds of things. So, just keep that in mind.

Chairman Hurley: There could be several agencies not just ALE, is that correct?

Chairman Goolsby: Yes ma'am. Any agency does that. Local law enforcement, state law enforcement, anyone.

Chairman Hurley: Thank you. Any further questions? Yes, Representative McNeill.

Representative McNeill: These monies actually go through the federal court, right not the state court?

Senator Goolsby: Yes. Under Operation Fair Share, they do.

Representative Faircloth: I understand what Senator Goolsby is speaking about but I also would hope we would understand that a lot of the supplies and operating vehicles and so forth that are purchased with these funds, if not using these funds would have to be purchased out of funds from another source. So I think we don't want to give the impression that they are just playing games with them and buying toys. Those funds are used in many cases a very good purpose.

Chairman Hurley: Right and ALE does not have any vehicles in their budget and we have not appropriated any so they have been using this for their vehicles. So it would have to come from our budget. Any other questions?

Senator Goolsby: If I may, Madam Chair. Just so we understand. We control our budget. We are giving the authority with this money going through the federal courts for agencies to control that money and that money would otherwise go to our public schools that we also fund. So, it is a way that an end-run is done. I would argue around the legislature on how that money is directed. The money could go to our Public Schools from those seizures and instead it goes through the federal courts and goes directly to the agencies. I'm not saying that's necessarily a problem but it's something you just need to be aware of. And there's \$2.7 million currently in the account that has come through that and I absolutely understand how the agency funds itself and I know that we don't give them money but that is the way that things happen in the world and just so all the members are aware of it. If you're okay with it, that's the way it's been going on, that'll just be the way it continues. Thank you Madam Chair.

Kristine Leggett: Madam Chair, Senator Goolsby, too, just in case you're interested the SBI has \$3.2 million in their seized assets account and the Highway Patrol has \$1.6 million.

Chairman Hurley: Thank you, Ms. Leggett. Any more questions about this issue? Okay, next one.

Kristine Leggett: Turning over to page 2, question number 4 was how many law enforcement officials are employed directly by the ABC boards, and that would be a total of 41 full time law enforcement officers and 10 part time and you can see the list and the chart of the boards that do employ their own law enforcement officers. It is primarily the large urban boards. And the question was also asked how much of the law enforcement money from ABC revenue is going to local enforcement to support alcohol law enforcement at the local, possibly in the local



departments. The ABC Commission does not track that number but we have provided for you a chart on the web-site showing the amount distributed for law enforcement by each board and so if you want to go on the web-site you can see how much your local ABC Board has generated for law enforcement. We just can't tell you exactly what your County Commissioners are using that particular piece of money for.

Senator Goolsby: Madam Chair, I know, I live in New Hanover County and I don't see New Hanover County on this list. I have met at least, I think three, I could be wrong. I think of one in particular, I know that we've got, I know that our local ABC Board pays our Sheriff's Department for deputies that are assigned to ABC enforcement and those were the numbers I hoped we had. Surely for \$4,953,070 we get more than 41 full-time and 10 part-time agents, I would hope.

Kristine Leggett: So, Senator Goolsby, let me take that in parts. If you have three employed by your sheriff's deputies, by your sheriff's department, they wouldn't show up on these lists. These are actually, like the Mecklenburg County ABC Board law enforcement. They are a law enforcement agency unto themselves. What you are talking about, they are a part of your sheriff's department.

Senator Goolsby: Yes and Madam Chair, then I asked for this information and apparently I did not make myself clear in the last meeting and I would simply reiterate... I want to know how much, how many people we have enforcing our ABC laws in the state? That, what we were told last time, there's 82 full-time ALE agents for thousands of clubs and bars and all this other stuff and I know that we employ hundreds of people across the state at our deputy sheriffs and all that are cross-trained to be able to do that enforcement. That's the number that I want. Not 51. I know that we've got this 51 plus we have somewhere in this mix of millions of dollars we've got money that goes to subsidize our local sheriffs, and in some counties probably a half a dozen or more whose job it is to go out and, they get paid by the ABC boards and they go and help enforce those laws. Those are the numbers I'm looking for Madam Chair.

Kristine Leggett: Madam Chair, Senator Goolsby, and that number is the number that the ABC Commission does not track. So to the extent that there is a piece of the ABC board revenue that goes to the local board or the county for law enforcement, ABC Commission does not track how that is used except in this instance where there is an actual law enforcement entity that has been created by that board.

Senator Goolsby: Madam Chair, I'm fine. I don't care what ABC tracks. I want to know just how many people are employed doing this. Okay and maybe someone from the Sheriff's Association has that number. I understand they're in the back.

Chairman Hurley: Is there someone from the Sheriff's Association who would like to speak to this? And please identify yourself.

Senator Goolsby: And Madam Chair, if they don't have it maybe they can get it to us.

Andrew Cagle: Andrew Cagle, North Carolina Sheriff's Association. Senator Goolsby, I'll do what I can to try to collect some of that information for you.

Chairman Hurley: Let me see if I understand this correctly. The ABC boards can hire their own persons to do their things and they would have to provide health insurance, etc., etc., which would cost them, probably. So, they hire out the sheriff's department or the city police to do that if they don't want to do it themselves and therefore it's probably cheaper on them. I'm just trying to be sure I understand.



Kristine Leggett: Madam Chair that may be what's occurring. And not every board is actually going to be paying specifically for a person in their county or in their district, dedicated to law enforcement. It could just be we're going to give \$50,000 of this law enforcement revenue to our local sheriff's department and maybe the sheriff's department is using it for alcohol and law enforcement, maybe they're not.

Chairman Hurley: I think in Randolph, I think in Asheboro, they have their own person but I know that's not a full-time job, so maybe part of the money would go there.

Kristine Leggett: So what we can do is work with the Sheriff's Association and maybe the Chiefs of Police and do a survey and see about getting some data that way.

Senator Goolsby: That would be good. Madam Chair, also if I could recommend that we get a further breakdown on these numbers because we're looking at 41 full-time people and 10 part-time people and the expenditure is almost \$5 million. I mean I'm looking at a couple of these places where it looks like in Durham County the two full-time members have an expenditure of \$300,000 a year. That's \$150,000 per member. Same in Pitt County, well it's less; it's actually about \$100,000 a member. Dare County \$150,000 per full-time law enforcement person for the expenditure. That is a great deal of money that I'd sort of be curious where all that's going.

Chairman Hurley: That's true. We do need that. Okay. All right, any other questions on that issue? Okay moving on to the next one.

Kristine Leggett: Okay the next question was what percentage of alcohol sales are attributable to private clubs. I believe this was Senator Bryant's question. The data is not directly available from either the ABC Commission or the Department of Revenue. What we would have to do in order answer this question is take the listing of private club permits and then try to marry that somehow to the revenue by entity, so it could be done. It would probably take several weeks if not a couple of months to actually get all that data compiled.

Senator Goolsby: I'm just curious. So we have private clubs that have licenses to sell alcohol. They have to buy the alcohol under those licenses, but we can't figure out how much alcohol they buy under those licenses?

Kristine Leggett: The question is related to how much they sell. Do you see so

Senator Goolsby: Yeah, but if they buy alcohol, they can sell it.

Kristine Leggett: What kind of revenue are they generating from what they sell? That's where we're having the issue. There isn't a data base currently

Senator Goolsby: Madam Chair, let's maybe cut to the quick on that, how bout maybe, we just get the information of the alcohol they buy, how about that? Surely ALE or ABC can tell us that.

Chairman Hurley: If they have it broken down like that.

Senator Goolsby: Well they have to have a permit, Madam Chair and I would sure hope that they keep up

Chairman Hurley: Well I know they would but I don't...okay, all right we'll work on that.

Kristine Leggett: We'll follow up on that. We'll may have to get the ABC Commission back in here.

Chairman Hurley: Does ALE want to speak on this matter? ABC is not here today, is that correct? Thank you.

Kristine Leggett: Okay, also related to the private club's discussion was a question of are there any policies governing the use of off-duty law enforcement at private venues? And the ABC



Commission has responded that they do not have any policies governing the use of off-duty law enforcement at private venues. And that's all that I had as follow-up from the ALE, ABC discussion Madam Chair.

Senator Goolsby: Madam Chair, I've got one follow-up. Can anyone from the Sheriff's Association tell us about use of sheriff's deputies for off-duty law enforcement at private venues? I'm pretty sure that I see Wilmington police officers quite often performing duties, off duty being paid.

Chairman Hurley: Sheriff's Association, Andrew

Andrew Cagle: Andrew Cagle, North Carolina Sheriff's Association. Each sheriff's office has a different policy on how they want their deputies to work off-duty.

Senator Goolsby: Thank you sir.

Representative McNeill: I was just going to add to that. In Randolph County, our Sheriff does not allow officers to work off-duty in a place that serves alcohol.

Chairman Hurley: Any other questions? Okay. That's everything on that particular. You have some more Kristine. Oh, excuse me, Representative Faircloth.

Representative Faircloth: Thank you Madam Chairman, before we get away from ABC, ALE, I wanted to make a couple of comments about some concerns that I have based upon some of our earlier discussions in our earlier meeting. And perhaps some ideas on moving forward with the, particularly the question of what do we as a policy making group want to have moving forward as far as our ALE operation in the state? I know the agency is quite concerned with some of the questions that have arisen as we've discussed this matter. I know in our budget process we talked a lot about it and some cuts were made and so forth, so it's sort of up in the air and we need to have a way of resolving this issue. I don't think we, those of us in the JPS Appropriations Sub-Committee should try to handle that without something from this Oversight Committee in terms of policy and I would suggest to you, as the Chairs, that we need to address the ALE operation in this state and what we think it ought to be. And I feel sure that ALE would be glad to give us their thoughts on what they think their role should be in state law enforcement. So I would hope that we can move forward with some policy, answering some policy questions in that area and tell them in effect what kind of ALE operation we want in the state and then we can adequately fund it.

Chairman Hurley: Thank you. I think they'd be more than willing to meet with us and to give us how they feel and what their mission is and what they see. The more you talk to them they are very open to any of you to ask questions. They will be glad to share any information. I have talked with them on occasions.

Senator Goolsby: Madam Chairman, if I may. Representative Faircloth, I've in fact today, on the Senate side, we spent a good bit of time with ALE speaking about some of their concerns and I feel like we made a lot of headway and I'll be glad to bring to the Chairs and then onto the Committee as we move forward. And I am proud to see a lot of the progress that I think with the new leadership over at ALE and the way those folks are going, the way things are moving at DPS, I feel like we all have a sense that the agency is starting to move in the right direction and does need our guidance and help and is willing to take that, I feel like and I feel like we started some very constructive discussions on the Senate side that I feel like will be followed up by the House side. I'll be happy to bring that to you all as it continues to move along. But I'm very happy with the progress of the agency at this point.



Chairman Hurley: Okay. I think we can get that worked out and meeting on that. Okay are there any more questions or anything on that. Okay, go to the next.

Kristine Leggett: Okay, Page 3, the Motor Fleet discussion. The first question, was there a program, I believe this was Senator Newton's question, is there a program where State employees who don't qualify for a State vehicle can use a State vehicle to commute and reimburse the State for the cost? Currently, 13 State employees reimburse the State for commuting miles. Eleven of those employees are on-call employees and they reimburse at a rate of \$3 per day for 20 per month. The other two employees are elected officials and since they are not on call they must reimburse the State at a rate of \$0.36 per mile. The Department of Administration also receives, or reports to Gov-Ops, quarterly on State vehicles that are used to commute for which reimbursement is not required. These are primarily law enforcement vehicles. We have posted the most recent quarterly report on those employees for you on the Committee website. The next question on motor fleet was the definition of an unsafe vehicle and the answer to that question is an unsafe vehicle is one that experiences repetitive mechanical or electronic failures rendering the vehicle unusable and unreliable. Ya'll also requested the list of vehicle problem reports that was being referenced by the Department at the last Committee meeting and that report is available to you online as well. All of these documents that I'm representing that I'm telling you are online there's a folder in the December 12, 2013 meeting folder on your website that says follow-up information for the November meeting. That's where all of these documents are located. The next question on motor fleet was are State employees using State credit cards to purchase gas at private gas stations, Representative McNeill asked the question four times and the answer is yes they are using credit cards to purchase gas at private gas stations. They do not have to go to a refueling facility. The card is issued by a company called WEX and WEX removes the Federal and State taxes from what is charged for the gas that the employees use. Is there an advantage to piggybacking on the federal system for vehicle purchases? The Department of Administration says that the state cannot piggyback on federal contracts for vehicle purchases. They did not provide an explanation as to why.

Chairman Hurley: I have a question. Do you know what the status is for the car purchases is at Motor Fleet?

Kristine Leggett: My understanding, Madam Chair is that DPS sent DOA a letter with a list of all the vehicles they needed and the cost of those vehicles and DPS had some questions about the numbers so DOA and DPS are meeting I think today about this issue and Ryan and Jared are in the back and are nodding at me so they are meeting today on this issue. Hopefully cars are going to be ordered. Speros said he had his finger on the button last time he was here. So one hopes that happens in the next couple of weeks.

Chairman Hurley: Okay. Well I will report on our status in Randolph County. We did get two new Fusions. I appreciate that very, very much. Even though it was several months late. I appreciate it very much.

Kristine Leggett: Madam Chair, John Poteat is going to come and take care of the last few questions.

Chairman Hurley: Okay, thank you. Mr. Poteat.



John Poteat from Fiscal Research (continued from Kristine Leggett's handout attached- items #11 & 12)

John Poteat: Thank you Madam Chair, if you all, there were questions relating to closed facilities. The first one was the disposition to assets. Since 2009, the Department or the General Assembly as closed 16 prisons state wide and so if you turn to page 5, this is an example from Bladen Correctional Center which closed, and this is all the assets they had in the facility. In the very last column is what has been done with those assets. If you flip to page 7 there's the one from Robeson also. The Wayne and Duplin closures, the asset report is not available yet and then Western Youth is phased to close at the end of, on January 1st and that report will be available to you all and as soon as that's completed. And then there was a question I think from Senator Daniel about personnel actions related to facility closures. If you turn to page 9 of the report, you'll see listed on the 1st column are all the facilities that are closing, their closure date, the number of positions that were abolished, the number of vacancies, and so you start with the number of employees affected, so the column that says transferred, those were employees that found positions, were offered positions within the department and moved to new positions. The retired or resigned column are folks that retired or resigned from the departments. The declined job offer no severance, this is somebody that was offered a comparable job within 35 miles of their workstation and they chose not to accept that and then the column that says severance paid, these are folks that there was no offer available or they turned down the offer. So you could have been offered at Duplin, let's say you were offered a position at Mountain View Correctional in far Western North Carolina and you said no I don't want to relocate to Western North Carolina therefore you were entitled to severance and so the very last column that says percentage of employees placed in new jobs that's the percentage of the folks who were transferred verses the number of employees who were affected. So you take the 55 positions for instance in Duplin out of the 66 employees that were affected, 83% of them found new jobs within the agencies. Looking down at the bottom, so far there have been about 86% of the employees having placed in jobs within the facilities in the state.

Representative Daughtry: I appreciate that information John, but the question I really want you to talk about a little bit is the disposition of assets at the prison, for example Bladen County. I understand there was a back-hoe, dug a hole and burned a bunch of stuff. Talk about that a little.

John Poteat: Okay. So, there was one of the things the department has and this is included in your follow-up folder. There is a closure checklist. What the department goes through when they close a facility. And so one of things that happened down at Bladen is as they were getting ready to close they were cleaning up the facility, they came across a bunch of old records that were past the retention date. And unfortunately instead of calling in a shredder truck as is normal policy someone had the idea that they could get a burn permit, dig a hole, put them in the hole and burn the records. That was done and as a result when the department found out, DEHNR was called in to investigate the situation. The stuff was dug up, properly disposed of, DEHNR investigated and found there was no sort of soil or air quality problems and as a result of that, two things have happened. One, DEHNR is now working with the department to develop some training for it's employees to make sure something like this doesn't happen in the future as well as this checklist the department has used for years as part of their closure process is now being codified if you will into department policy. In addition to the first hole that was



dug, there was a second hole dug because they were on a roll I guess, and put some other unsalvageable old furniture and stuff, there were no liquids, there were no contaminants in there. Again, DEHNR investigated and once the department quickly cleaned this up, that matter was resolved from the DEHNR point of view. The acting superintendent that was at the facility is no longer with the department and the other staff involved, the Director of Prisons and the Deputy Commissioner of Adult Corrections Juvenile Justice is right now reviewing what other disciplinary action is necessary for those employees.

Chairman Hurley: Follow-up? Any other questions, anyone? We'll go to the IDS Conflicts of Interest Reports – William Childs, Fiscal Research

William Childs gave a PowerPoint presentation on the Office of Indigent Defense Services (per the attached)

William Childs: Thank you Madam Chair. William Childs for Fiscal Research. I'm going to do a quick overview of the Office of Indigent Defenses Mission and Budget. This is an image of the North Carolina Judicial Branch. There are two agencies in that branch and the Office of Indigent Defense Services or IDS is on the right. As you can see there is a Commission on Indigent Defense Services that oversees the policies of IDS and appoints an Executive Director, who is Thomas Maher, who you'll hear from in a moment. Mr. Maher and his staff at IDS's administrative office supports the work of the public defenders, private appointed counsel, a number of specialty defenders and the contract defenders about which we will hear a little bit more. The budget for the IDS Commission in the current year is \$128 million and the total FTE supported by General Fund is 580. Indigent Defense Services is based on two amendments to the Constitution which I've posted up here. The Indigent Defense Services, I'm sorry the Office of Indigent Defense Services came into being in 2000 with the passage of the Indigent Defense Services Act, which is Article 39B of the General Statutes. Previously, Indigent Defense was offered in North Carolina through the Private Appointed Counsel Fund which was administered by AOC. As of the passage of this act, it was separated out and created and a new agency was created. The main mission of IDS is to offer legal counsel for indigent persons which it does through three means at this time. There are the State Public Defender Offices, 16 of those in the 42 District Court districts, these two overlap in some Superior Court Districts. There's also regional and Statewide Specialty Defenders, there's a Private Appointed Counsel fund, which compensates private attorneys for the work of indigent defense. There are also the Contract Defenders, which is an initiative which started in 2011. This is an image of IDS' current budget. This is consistent with its budget in the last few years. About one third of it goes to the Public Defenders, about two thirds to the PAC Fund and another 2% for administration. The Public Defenders are in 16 offices as I mentioned before and this lists the five specialty defenders that are out there: Juvenile, Appellate, Parent Representation, Capital Defender with their four regional offices, and the Office of Special Counsel which deals with Mental Health and their for their four regional offices. This is a map that we drew up in house to show where the public defender offices are with an over with the Prosecutorial Districts. Private appointed counsel fund is the way that IDS provisions most of its indigent defense in the State. The significant budgetary issue with the PAC fund is that it has run a short-fall in the last few fiscal years. This year the current estimate is \$6 million and last year it was \$8 million and in the 2 prior years it was also \$10 million. This is an image showing IDS' budget of the last 5 years. The white box



at the top is the short-fall and the green box shows how much was spent on the PAC fund, red box public defenders. As you can see, it's been mostly and fairly consistent. Due to recent legislative actions, 2011 the Legislature reduced the PAC funds by \$7.9 million and eliminated sentencing services which the Legislature felt was redundant of that plan. For a \$10 million cut the agency also directed a special provisions a request for proposals to bundle PAC cases and this is the contract defenders that we'll hear about in just a little bit. There's also an expansion provision that allotted IDS to create new positions out of funds appropriated. In the 2012 session there were no legislative actions taken to IDS and in the 2013 session the Legislature reduced IDS contract for prisoner legal services \$0.9 million. There is a reduction to IDS budget by \$2 million that was following a low-level misdemeanor reclassification and there was a small reduction to administrative staff for a total \$3.1 million cut. The Legislature also put \$3.8 in non-recurring funds. Two special provisions that I think we may hear about, there's a provision that allows, that moves the appointment of public defenders in these regions from the IDS Commission to the Senior Resident Superior Court Judge in that district and there was the conflict of interest report which we will hear about next. This I included just for your records, was a copy of the provision for the Conflict of Interest Report.

Chairman Hurley: Are there any questions on this part? We'll move forward. Thomas Maher, welcome.

Thomas Maher gave a PowerPoint presentation on Public Defender Conflicts and Requests for Proposals & Contracts (per the attached)

Thomas Maher: Thank you Madam Chair and let me thank the Chairs and the Committee for this opportunity to address two issues which are in some respects related because they deal with how IDS is attempting to move away from hourly PAC appointments to provide indigent representation in other fashions. I'd also I think be remiss, I think if I didn't, although I think he's stepped out, thank Judge John for the work the crime lab has done in providing training for defense counsel and tours and things of that nature. I think that's been very useful. I'm here today to talk about two different provisions but both of which I think are animated by concerns that the traditional system of having lawyers off of local rosters appointed individual cases they track their hours at the end of the case they submit their hours a judge will review whether they think the hours are appropriate and we then get a fee application signed by a Judge which we pay at the appropriate hourly rate, but that has problems in terms of the budget both in terms of how much is spent but also in terms of predictability because we're getting these case fee applications at the end of the case. I know most of you know how we operate so I'll try not to go over too basic an issue, but basically most of the representation is provided either by salaried public defender offices where full time lawyers work doing nothing but indigent defense or private lawyers who are working either off of these rosters or now increasingly under direct contracts where we're paying them directly for providing representation. The first provision I'm going to discuss is a provision that deals with the extent to which public defender offices can cover conflicts that another public defender office in same region is not able to provide representation to. And William had put this language up. This is a new provision the General Assembly passed last year that says that when it's practical, a public defender office can cover a conflict from another public defender office but they are to seek to do that rather than to use a private lawyer who is then paid at the end of the case. And directs IDS to report on the degree to which this is



being used. One of the things I think that's important for people who don't necessarily work within the public defender office or the criminal defense field to understand is why a public defender would farm out cases to begin with. A public defender office is treated as a law firm and they cannot represent all the clients and so what happens is there are times when even within a public defender district, the public defender office can't represent a client. In those districts, we have rosters of attorneys who are available, local attorneys who are available to take those cases and be paid under the same system as in the counties or districts where there is no public defender. There are as we put up here direct conflicts of interest and work load conflicts of interest. There are also times when just for efficiency of representation. A direct conflict of interest arises when for example two defendants may be arrested and charged with the same crime. One of them may want to make a plea arrangement with the district attorney to provide information or try to shift blame because the public defender is a single law office for ethical reasons they cannot ethically represent both of those clients, so one of those defendants will have to be represented by somebody not working for the public defender office. There may be times when somebody who is a witness for example in a case has been charged with a crime and has been represented by the public defender, so there's another ethical conflict. There are also work load conflicts which we'll talk about some, which is to say that a public defender office has to make sure that they have the time to adequately represent all the clients they take on and there are times during the year where there may be influx of cases that they just cannot ethically take, because they don't have the time and ability to represent them. And then there are sometimes where there may not be an ethical rule preventing them from representing, but that client may already be represented on other matters by a private lawyer and it's much more efficient for everyone if that lawyer takes that additional matter. I realize you all have been here a long time; I won't go into great detail. The State Bar has ethical rules they publish opinions on the ethical rules and they make it very clear there are times when a single lawyer cannot represent multiple people or cannot represent people with conflicting interests. And because a law firm is treated for the rules of ethics as if it was a single lawyer public defenders although they may have multiple lawyers will be ethically conflicted out of a number of cases, so there's always even in a public defender district a number of cases in which we have been using private lawyers to provide representation. Work load conflicts also come up. There are ethical rules that require that lawyers act diligently. That they provide competent representation and quite often because of the fluctuations and caseloads you may have a week or a month where a large number of cases come in and the public defender can take a number of them but they can't take all of them and meet their ethical obligations, that they have to farm out cases which if they'd come in at a different time of the year they'd be able to keep, but because of their work load they're not able to keep. And so the public defenders, while they strive to take as many cases as they can and many of them work very hard and take a lot of cases cannot always take every single case that comes to the office. Those again are cases where a private lawyer is appointed. This provision that I'm talking about recognized that there might be potential areas in which rather than using a private lawyer to take that conflict case, it would make sense to at least explore the possibility that another public defender office could take the case and that a salaried full-time public defender would take on the case. I will say there are some challenges to that particularly in North Carolina. I think there are some states that do it more regularly because of geography and how they are set up but there are some challenges. One of the main challenges of course is



geography. A lawyer who has to travel, from say Wake County to Durham County to handle a case is spending time on the road that they would otherwise in Wake County be spending on cases in Wake County and that means that their ability to cover the full case-load in Wake County is reduced, whereas the local lawyer in Durham who's appointed and already in Durham there time is more efficient because they're not traveling. There are times when this will work. We're certainly exploring it. There are offices that are in adjoining counties where the travel is less; Wake and Durham for example, while it takes some time to get between them are adjoining counties with fairly straight shot roads. And then there more serious cases where the amount of travel time may be a relatively small part of the work that needs to be done, so it wouldn't be greatly increasing the percentage of time by the travel and there may be benefits to having a public defender cross county lines to handle the case. This is a map that shows, and we've divided this up to show the Prosecutorial Districts but the colored areas are where we currently have public defender offices and they actually are grouped often in adjoining areas though in some areas, for example the First and Second District is a very spread out rural area with a lot of travel involved and even for example travel between 15B and 15A adds time. In taking that into account, it's important to keep in mind what our average hours are for the private assigned counsel. In superior court for example, for a Class C Felony the private assigned counsel averaged a little more than 15 hours to resolve a case. For a lower level Class I Felony it's 3.1 hours. If you add travel time for public defenders, even driving from Wake to Durham and they have to go more than once for the case, you're going to find that their hours may in fact be less efficient than the private lawyer in Durham who's in the Durham Court House handling other cases and doesn't have that type of travel time. A District Court of course where the case is received more quickly, they're less serious cases, the hours are even less and the ability for example to have a public defender from another office to come handle a DWI or handle assaults and things is reduced when you add in the travel time. One of the things that we were directed to do is to track data about these complex things and report on it in the future. We certainly track when offices are farming out cases. We have not in the past required that the offices designate specifically why they're farming out the case. It may be a work-load conflict, it may be a direct conflict, it may be an efficiency issue where private lawyers are already representing the clients, so while a number of them and we filed the report their information on their own for their own purposes were tracking the reasons for the farm-out there was not a uniform system for doing that. That has been changed. When we file the report next year we will have much more comprehensive and uniform data. What we have for our public defenders is an on-line disposition system where they come in and when they're reporting cases they've disposed of they literally can go in for each office and each lawyer and click that they've disposed of a given case. Well we've added the ability that when they farm out a case because of a conflict that they'll go in and literally keep count on this on-line system and we will then have a break down by office and by case type when they've done a farm out either to another public defender office which will be recorded in the far right or to a private lawyer and the reasons for those farm-outs. Now, as I mentioned the biggest obstacle to this is the percentage of time that would be spent in time in travel for the relatively small cases. There are certainly bigger cases, murder cases, complex sex offense cases where it would make more sense because travel is a smaller component. I will alert you and there is another option which actually is in place in Mecklenburg, has been historically, I'm not, to be honest, sure when it first started, it pre-dates



me, that we will examine in other offices, which is to say that there's a full-time Gaston County Public Defender who works in the Mecklenburg office doing nothing but conflicts for the Mecklenburg office. They are legally not part of that public defender's office they are allowed to handle conflicts because they are under the supervision and control of the Chief Public Defender in Gaston County. There are larger counties where that may make sense. In other words, to add positions within a given county where you've got lawyers who ethically can take the conflicts because they are supervised by an adjoining office and then you don't have the travel time, you don't have the additional inefficiencies that would take place if they were taking a few cases and traveling from one county to another. That is only right now, one assistant in Mecklenburg and it is something that we've been talking with the Chief Public Defenders about to see if there's an ability to do that. There's obviously challenges even with that in terms of supervision, running in essence a conflict office in another county takes some doing but I know that in states that tend to have state-wide public defenders, there tends to be more built in infrastructure for covering conflicts. So at this point this has not happened very much. It's a new provision. We've been talking with the chiefs about taking advantage of this when it's practical and tracking the data and thinking through when it is practical and how we can maximize the benefits of the ability of public defenders to cover each other's conflicts. I'm going to be talking about another provision but that's what we have to say on this particular provision. I'm not sure if you want questions on that or hold questions.

Chairman Hurley: Are there any questions on this part? Okay, let's move forward.

Thomas Maher: This next provision also deals with a move away from using hourly private assigned counsel off the roster system. I will say that we're going to get into some details. I hope that it's less complex than it may seem at first because we think that it's a really important change in how our indigent defense representation is provided on this. It presents some benefits it also prevents some challenges. I would also say with the Chair's permission we have James Payne, who is a private lawyer here from Shallotte, who in addition to being a private lawyer who does both private work and some appointed work is the Chair of our IDS Commission. I know he met briefly with, recently with Senator Goolsby and with the Chair's permission he has some comments to make at the close of my presentation, if that would be acceptable.

Chairman Hurley: That will be fine.

Thomas Maher: Thank you. What I'm going to talk about today is first of all, briefly the legislation that directed IDS to move to this system of what we call RFPs Request for Proposals and Contracts. How we've implemented the RFPs and the contracts to date, the benefits of the contracts system because I believe there are benefits to a contracts system the challenges to a contract system because as we'll talk about there are challenges to a contract system. What our proposed next steps are including some modifications for how we're doing things and then Mr. Payne will talk some about the adequate funding of indigent defense because the contract system clearly is intended to try to preserve the quality of representation while making sure that we don't spend money unnecessarily and I think there probably are efficiencies to be gained so I'll talk about. But we always have to keep in mind that there are times when the efficiencies start to infringe upon the quality of representation. Okay, this is the current version of the legislation initially enacted in 2011, there were some minor changes which we've addressed in our policies the last session but in essence those provisions said that IDS is to provide, issue RFPs Request for Proposals to enter into contracts of all classes of legal cases for indigent clients in all judicial



districts. In other words work towards developing a state wide comprehensive contract system where we would be contracting directly with the lawyers in response to what are called request for proposals. Historically we have done some contracts. Some of you may have contracts in the counties where you're from. They tended to be counties where the local roster system was not working for some reason. Some very rural counties to get lawyers to be willing to do what they wanted kind of a guarantee that they were going to get a percentage of the case load. They tended to be specialized representation, juvenile delinquency or parents. We did not have a large state-wide system, so that's a major change that we've been working to implement. As I said, the special provision says we are to issue RFPs for all classes of cases in all districts and that we are to consider both the cost and the quality, which is consistent with the initial IDS act. I mean IDS was created for truthful purpose which is to control and contain cost while ensuring the quality of the representation and that it meets the constitutional standards. It was intended, clearly to shift our use of private lawyers from hourly case by case system to some contract system where people are paid on a different basis. From our perspective and I think it's consistent with the perspective of the General Assembly, that our goals in setting up a contract system were that it contained costs and increased predictability. One of the things that you all know from dealing with IDS is we're often asked to predict how are we going to do in a given year, are we going to be short, are we going to live within our budget? And of course we do fairly good predictions. We generally come pretty close on the mark but they are predictions because we're paying for cases after the work has been done and for most of those cases we're not even really aware of the case or the cost until it's done and we get the fee application. The contract system moves away from that level of unpredictability. For the contract system to work particularly with the importance of quality our job is to identify the lawyers who are able to provide quality representation while working under the constraints of a contract system and then to the extent we can provide them with some training and resources to support to make sure the clients and the tax payers are getting what the money is being spent for, which is to say competent, constitutionally adequate level of representation and in the process capture enough data about the case loads, the work that's being done, the outcomes, so the both IDS Commission and the General Assembly have the information they have to evaluate the system and make decisions. I spoke here I think it was two years ago about how we developed the system and I'm going to give you a briefer overview today than I did then. But in essence the contract system, the one thing that was clear you can't have a contract system that in essence replicates the roster hourly system because then you're just paying for hours after the fact and there aren't any benefits to anybody on that, so we needed to find a way to pay lawyers what we believed was a fair compensation but to do it in a way that moved away from the hourly system. What we ultimately came up with is lawyers contract to take case loads and you'll see in a little bit that the case loads varied depending upon the nature of the case and there are a range of cases to give us some flexibility but in essence a lawyer contracts with IDS that says I will take this case load of misdemeanors and this case load I will get in the course of a year or two years and during that time I get a set payment and that payment's divided up on a monthly basis and every month assuming that they're doing what they're supposed to do they get the monthly payment. They're not paid by the hour they're not paid specifically by the case they're paid by taking a group of cases. And what we did to develop the case loads was look at all the data we had about how much time lawyers were spending under the hourly system and figure out what the range of cases



was and then actually as you'll see, built in some cost efficiency, both because we need to clearly we have to live as best we can within our budget but also because our research shows that lawyers with larger caseloads who are in court on a regular basis do in fact gain some efficiency. So when we issue an RFP we're basically coming to a series of districts or counties and saying based on our prediction of the work load these are the case loads we have available and inviting lawyers who are interested to give us information about their ability to provide the services under the contract and move to that system. When we create these case loads one of the things one discovers when looking at this is there's a fair amount of variability in case loads. In may well be, and there has been that in general there has been a decline in cases which has been a benefit but in a county to county basis some counties may see a rise other counties may see a fall it varies on case types so we spend a fair amount of time looking at trends sometimes talking to local people to figure out what they think about the trends to predict the future case loads. We also go and meet with all the judges and clerks to find out about specialty courts, different court systems operate differently. Wake County for example handles probation violations by the sessions which is not how Durham handles them. Some courts have specialty courts. We talked to the judges about how many lawyers they need to make sure the court schedules are covered because if you give a contract to too few lawyers what we will then hear from judges is their cases aren't moving because that lawyer is tied up in court and isn't available for some other case. The most any one lawyer can contract for would be five units because that would be full-time work, in fact nobody has five units. We've been lucky to find enough lawyers to spread the work out so court schedules have not been adversely affected by the contracts. We've divided, we started off with adult criminal cases they are where we spend a big chunk of our money so there's room for savings there. They are sufficiently voluminous that you can work a contract system within them. We have enough data to do a pretty good job of predicting the needs and what the hours are. A misdemeanor contract unit, the lawyer has to dispose of a minimum of 102 misdemeanors in the course of a year and a maximum of 124 and there's lower amounts for what we call low-level felonies and high-level felonies. High-level felonies are A-D we drew the line at D because a conviction for a Class D felony carries an active sentence regardless of your prior record and so we thought that was an appropriate place to make a demarcation of when cases become serious. If a contractor gets to the point where they're reaching their maximum and it's before the end of the contract, we can either negotiate to pay them extra to take more cases or they can decline further appointments and the other cases will go to another contractor. This is a big difference in some respects than the roster system. The lawyers enter into two year contracts. If they're happy with it and we're happy with them they can be renewed for two years at which point we allow competition because we want other lawyers to have a chance. The contractors have a pretty good idea of their case loads over the course of the year. They know what they've obliged to take and we have paid them upfront. So at the end of the contract if they haven't resolved the case they're still obliged to represent that client and finish out because we've already paid them for the work. From the contractor's viewpoint, they get regular payments. Every month they know what they're going to get assuming that they've reported that they're in fact doing the work. We have so far as I said focused on the adult non-capital criminal cases, low level felonies and high level felonies. We have contracts in districts where we have contracts with specialized courts such as drug treatment court, mental health treatment court, etc. We have separate contracts for those. That really varies from county to county and district to



district depending upon what they're doing. We started off with the very first one covering six counties, districts 9, 10 and 14. Those contracts have been in effect for a little more than a year so those contractors that are about half way through their first term of their contract. Our second contracts went into place June 1st and they finished the third division so the entire third judicial division for adult non-capital criminal is covered by contracts through that area of the state. We have another RFP out the proposals have to be postmarked by midnight tomorrow. We're already starting to get some. This covers 3A, 8A & B and 11A & B and so that's another seven counties that would be under contract once that process is done. We would expect the actual work under those contracts to begin in June because it takes us time to evaluate those provisions and if we've turned somebody down because of quality concerns they're entitled to go the resident superior court judge for review of that and it always take some time to work with the judges and clerks to make sure they understand how the assignments will take place under the contracts. Just so and you all may already know most of this, but IDS provides representation in a significant number of cases and they range from very minor cases to very serious cases. For fiscal year '11 there were more than 200,000 individual fee applications from 2,600 private lawyers, some of whom did a lot of work some of whom did very little work and the actual cost in that year was \$68.7 million. We now have 150 lawyers under contract in the third judicial division. I'm going to show you briefly some screen shots of how they report and how we track the work because one of the things about a pay as you go system is you have to make sure people are getting the cases and that they're doing the cases but there's over 20,000 pending and disposed cases from those and we're going to be moving into additional judicial divisions. One of the things and it took us a while to develop this, part because it was brand new to us and part because it's a complex system but we've developed in-house a web-based on-line reporting system because the contractors aren't being paid based on a fee application at the end of a case on their hours, they've already agreed to take the cases. So we have a web-based system that when they enter the contract we set them up as a user and they each month tell us what new cases they've been assigned so we know that they're getting the cases that they need to get to meet the work. They then tell us on a monthly basis which cases have been disposed so we know the cases aren't piling up and that they haven't been moving their cases. So we're able to track their progress from meeting their contractual obligations and figure out whether we've misestimated our needs for lawyers. They give us when they dispose of cases, their outcomes, we know what's happening to the cases and we have developed a prefilled recoupment form that they print out and provide to the judge if the client is eligible for being ordered to repay attorney's fees, they have a form with the information already in there for the judge to use if they want to enter an order that the defendant repay the attorney's fees. Then each month they certify that they've given us all their information and if they certify that they've given us the information they get paid and we monitor how they're actually doing. This is in essence this is what the system looks like. Somebody who is working for us will go on the web and have their user name and password and they'd log in. If they had a new case this page would come up and basically they are entering information they would normally write into a fee application but it's the name of the client, social, you know, what the charge is, things of that nature up front before the case is disposed. And this allows us to see that they are in fact not just disposing of the cases but actually getting the cases that they need to be getting. They will tell us what the most serious charges so we know the nature of the cases they're getting. We've always measured that by not



the number of charges but what the most serious charges. When they dispose of a case they pull that case back up on the system fill in information about the disposition of the case, a lot of these are drop down menus that will allow us to get a consistent description that we can look at across cases. They will tell us if the case was disposed of with a judge, who the judge was. We are able to then track, this is what for example entries for a single contractor would look like who I believe who had a misdemeanor contract we would see all the different clients they're representing and the stage of the case. At the end of it they will enter the client's social security number. Our system only saves the last four digits for privacy purposes but it will print out the full social security number and it will print out this pre-filled form for the judge to use for ordering recoupment of attorney's fees. That form doesn't come to IDS for payment because we've already paid them under the contract system. They've been certified and get paid. One of the things about this is that all this information is collected digitally, we don't have to enter the information, they've already entered it and so as we're progressing with the system we're developing what are called exceptions reports. Some of you may already know what they are, so excuse me if I'm talking at too basic a level. But, it's going into a vast number of cases the system will flag lawyers for example who aren't getting enough cases or appear to be entering the same case multiple times or who aren't disposing of their cases, so that we can on a regular basis, basically get a red flag that says this contractor seems to be behind on the number of cases or their getting more cases than we expect and we need to deal with that and then our contracts administrator or regional defender can actually look into the specific lawyer's situation and figure out what's going on and whether there is in fact a problem. We have set, as I said a set rate for the contract paid on monthly installments. It means that for the areas that were covered by contracts we have a better ability to say to the General Assembly or the IDS Commission or anyone that our coming needs for this area are X because we've contract with lawyers for set amount. As you saw the case loads have some flexibility. It allows us in essence to cover what might turn out to be a slightly larger case load in the county because the contractors have an obligation to take at least some additional cases. It's very hard to predict an exact number of cases. We have set the prices based on our data of what lawyers had been being paid and then reducing that somewhat. Now I will say we've set the prices and we've set them as our contractors will tell you at fairly low rates but we have not had contractor's kind of try to come in either raise the rates or lower the rates. There are good lawyers who I'm sure that would be justified in asking for more money for the work they do, we can't afford it. And by setting the rates we've convinced a number of experienced lawyers to be willing to work with us because they recognize that's the rate. There are lawyers I suspect who would bid less, the problem is at some point you can't do the work that's required to represent say 100 people charged with misdemeanors for significantly less than what we've built in without cutting corners so we've set at what we believe is a very low rate that will still allow attorneys to meet they constitutional and ethical obligations. Under the and in your printout you may see I think a different number for misdemeanors. We've refined our analysis and I think this is the accurate number. Looking at what we pay on average for a case through the hourly system you see for example for a misdemeanor we pay \$190 average. A contractor who meets only the minimum number of dispositions will be paid less, he'll be paid \$171. That's a 10% built in savings for us. We are confident that our contractors are going to meet their minimums. Many of them are going to do more dispositions than the minimums and in essence the per case cost will drop. There are other



savings for the low level felonies and the high level felonies. Now one of the things about a contract system is it's based on averages. It's based on our estimate of how much time a group of cases will take and we warn contractors one year you may find your cases take more than we told you they would the next year they'll take less. There's a huge amount of variability. Some of which is not within their control but there are some appointed cases which just can't be covered by the average. So we have a provision that if there is an extraordinary case they can come to us and assuming it truly extraordinary they can either get paid somewhat more for that case or we can reduce their other case load to make up for the fact that they got this case. And I will say in a year of operation we have not yet paid any extraordinary cases. We've only gotten I think one request which while we understood why the lawyer was making the request we didn't feel it truly extraordinary. We've also built in the expenses that the lawyers would normally charge into their contract amount for things like copying, things they might itemize on a fee app. Once again, if there are extraordinary expenses that they paid out of pocket in a given case they can come to us and seek relief from that, otherwise they're responsible for those types of expenses. We have done some price fitting. Typically in work that's done by the session for example, many of you are familiar with how drug treatment court works, where it may meet twice a month for an afternoon every other Friday and we have allowed lawyers to price fit on that partly to see how it works to see if there is much variation in that and largely because when somebody does that work and most of the people who bid are people who are already doing the work, it's a lot easier to predict the amount of time that's going into that work. You know that you're going to have a bi-weekly session that's going to take a certain number of hours that you'll have some other meetings outside of court and they're in a much better position to set a reasonable amount and for us to be in a position to make sure they're not cutting corners. They can't walk out of drug treatment court half way through because they decided they weren't being paid enough. So we do have some of those. As I said we have built in cost savings for us and for the lawyers to even get back to what was the effective hourly rate they have to be more efficient. There is of course the danger of being more efficient, which means not doing the work. But we've actually done some research, looked at the average hours by attorneys based on how many cases they handled in a given year and there is a reduction in the average hours when caseloads go up. The biggest reduction is when they go up from very small numbers to a more moderate number but there are continued reductions and this confirms our kind of common sense belief that a lawyer that's handling 100 misdemeanors and is in court regularly will probably be more efficient per case than the lawyer who had 20 and may have spent their wait time on only one or two clients on a given court session as opposed to three or four. And in essence if the attorneys achieve the efficiency they can get back or maybe even exceed the hourly rate but we've guaranteed ourselves a savings. There will be ultimately and we're seeing it in the third division a reduction in paperwork. We're not getting fee applications per case from those contractors and processing and making those payments. Judges will not have to be reviewing hours and setting fees other than to order recoupment. So in cases where there's no recoupment the judge and the clerks don't handle payment on that and so they'll be some savings there. The contractors appreciate one of the incentives, despite the relatively modest pay, is the steady pay. They know that each month they have an amount. They may pay their rent, they may pay part of their overhead and they know each month that comes in. And we are also able to at least so far make sure that we have to suspend payments to the PAC hourly that we have money set aside to



pay the contractors, so come May or June they still get paid. We have a full time contracts administrator; we used to have a half time when we had this kind of smaller contracts. Her job, she's not a lawyer but we're lucky to get her, she came here from New York where she did a similar job for their RFP system, is to make sure that the contractors are kind of the business sense, are they getting the cases, are they doing the monthly reports, answer their questions about how they are handling the contractual aspects. When the system is statewide covering eight judicial divisions we would hope to have four regional defenders. Right now we one who's been on place for a year and we've just hired a new one. They each would cover two divisions that's a quarter of the state and their job is to be the kind of quality control folks. They take phone calls from judges if a contractor hasn't shown up in court or is unprepared to take calls from clients. They take calls from contractors who face an issue in a case they have faced before or have other issues. They'll go show up in court and watch to make sure people are doing a good job and that judges are available for questions. We believe that this will counteract the potential pressure for lawyers to kinda cut corners when you're paying them on a contract basis and provide resources for many lawyers who are working very hard handling large numbers of cases, a regional defender may help them on a issue more efficiently than having them try to spin their wheels or do their own research. And so far I think that that has been a successful experiment. As all of you know, each county or district takes I think great pride in how they operate and they don't always operate the same way and in many respects that's a good thing. We are trying not to kind of impose IDS cookie cutter across the state. We will go when we get the proposals, we let the local judges know who's asked for contracts and invite them to give us feedback. Is this person highly qualified, qualified, unqualified, so that the judges who see people in court have a chance to give us information. They also give us other references and always uniformly collect information from them. We have I think done a good job of making sure that the lawyers that get the contracts are doing good work. I have no doubt that that are good lawyers who we didn't give contracts to because in many counties there was more interest in the contracts, at least this first roll-out than contracts to award but I think we've done a good job on that. There are challenges to a contract system. For one thing, savings are not immediately realized. We're shifting from a path and a fact system to a pay as you go system. So that means we're paying the contractors while they're taking on the new cases while we're still paying, say in Durham the fee apps from the pre-contract cases. So there's in essence some up-front investment. That washes through and what we've found is that while there is a cost to that, that the savings from the contract system is reasonably quickly making up for what would be the up-from costs as we roll out to the next system. And of course, ultimately with the system in place then you'd be paying for cases on the go and you wouldn't necessarily have the kind of unknown liabilities we currently have. There is a risk of course for recoupment reductions. Judges order recoupment now when a lawyer submits a fee application and gets paid and the lawyers has an incentive, one hopes, to accurately record their hours. They are not being paid by the hour anymore so they have less incentive to report that. One of the reasons we have this kind of data base is that we can check on are they printing recoupment forms? We can look to see whether recoupment isn't being sought as often because recoupment is an important part of our budget and we do our best to educate our lawyers that it's important to get recoupment when a client can pay it so the funds are there to help represent the next client. There is less flexibility. A contract system to work has some stability but for IDS and the contractors. Contractors we have allowed them to get out



with notice even without cause because if at some point it's not working for them, we can find someone else, but if there's a sudden change in a case load there's less flexibility than the old system. So for example, December 1st a Class 3 Misdemeanor means for some people no longer entitled to appointed counsel so we're adjusting contract levels to meet what we expect to be the decline in need so we don't overspend in those areas where we have misdemeanor contracts. If there is a significant increase we're in a position to add more contracts but it's something we have to monitor because it's not just self-adjusting the way the rosters were. We have to be honest all we've gone in the low end with contracts it is easier to add work than to find out you've contracted for more work than there is, so far we've been able when we've need to, to add contractors because we don't want to over commit. Another challenge is nurturing the next generation. I mean ultimately our obligation is first to the clients, and second to the tax payers to make sure the clients receive good representation and the money is well spent but the long term health of any system and certainly is true for the Indigent Defense System is the young lawyers coming in having an opportunity to develop and get skills. The issue has been for us, we have many lawyers looking for these contracts at this point. We have to make choices. Lawyers who are fresh out of law school who have never done a case are not in the same position to compete for a contract with somebody who's been out for three, four or five years and has done the work and can demonstrate it. What we've done is create the ability in this next RFP that a lawyer believes that their lack of experience may hold them back that they can get another local lawyer to basically sign on, saying I'll mentor this person I'm not taking them on as a partner or anything but I'll be there if they have questions, I will make sure that they're not floundering, that they have some support network. We will consider that in allowing people to start contracts who might not have been able to do it in the past. In the past if a young lawyer was part of a law firm they had built support, they had built in supervision. They could get contracts. This will allow young lawyers who's literally gone out and hung up their shingle to get an older more experience lawyer to basically have their back and give us a level of comfort that we can contract with them and they that are in fact going to gain experience and not flounder and our hope is that will allow more younger attorneys to be part of the contract system. As we go forward we a lot of it depends obviously on the resources to develop other means of increasing experience. If younger lawyers could be paid a modest amount on extraordinary cases to sit what's called second chair and help a more experienced lawyer it helps the lawyer with a difficult case and it gives the younger lawyer experience. So we're certainly aware of the need to help develop the next generation while managing our budget. We have now as I said completed the adult cases through judicial divisions 3 we're moving on 1 through 4 we're kind of doing that part of the state before we move west so that we'll not be hiring unnecessary positions to support it until we're ready for there. We're working to pilot test a more specialized contract. For example it would be nice if we could do a driving while impaired contract where lawyers who want to specialize in that could take the contract. It sounds simpler than it is because that specialized cases tends to be smaller numbers of cases, it tends to be more fluctuation and you have to figure out for example if somebody takes the driving while impaired case and their client then picks up another charge are they willing to take that other charge and make sure that you've considered all the ramifications. But we hope to try that because there may be some real benefits in terms of attracting lawyers who are interested in that work who could develop the skills and other lawyers who have taken the general misdemeanor contracts may be perfectly happy not to be dealing



with driving while impaired which are while they're district court cases can be more complex. We are working to be able to analyze the data for other case types like abuse and neglect dependencies so we can enter into contracts for those and gather the same data we need for that case types. I'm going to turn over the last of the presentation to Mr. Payne. I'll obviously be here for any questions. I'll also say if anybody has more detailed questions we're happy to meet with folks, we're happy to show people the system. We certainly would encourage anybody to contact us.

Chairman Hurley: Mr. Payne, we're getting down to a few. We've still got most of the House if you will make it brief, if possible.

James Payne completed the PowerPoint presentation on Requests for Proposals & Contracts (see attached)

James Payne: My name is James Payne, Co-Chairs thank you very much, Senator Goolsby. The message here that I'd like to point to is the Gideon's Promise. I speak to you as a private citizen, as a private practitioner. That promise is a security of each and every one of us. Society's security. It's not just promising to those who can't afford it, a good lawyer. What that promise recognizes is that our society and the security of every one of us in here depends upon the trust that we all have that we're sitting in that chair that we're going to be adequately represented whether we can afford it or not. And the problem with the contract system as it's currently funded threatens that. And without death by PowerPoint, I'll tell you why that is. If you take the slide that Mr. Maher showed you about high-level felons, those are folks that can face live in prison, a Class B1 Felony for instance they face life in prison and you're asking a lawyer to receive about \$1,000 or \$1,100 to keep that person out of prison for the rest of their life. I don't know of any, any kind of case that can be represented on that kind of scale. Now I am not one who stands at the trough of the public dollar myself, I do represent the industry. It's not what I rely upon but I can tell you from doing this myself and from talking to other lawyers who are looking at contracts coming down the road there is a problem on the horizon and that is if we are not going to fund lawyers adequately, then here's what will happen the good lawyers that can do it are not going to take it. They're not going to go into the system. That's going to drive in the lawyers that are not as experienced. And that's not fair because here's what I tell you I hear every time I go into the jail to talk to a court appointed client, "you work for the DA, you work for the State, you get paid by the State so you're not going to give me the best that you can". What is that message going to be if when, because the message will get out there that no matter how hard you work you're going to get paid the same. No matter how little you work you're going to get paid the same. What confidence is there going to be in criminal the defense representation? That tension can only be exacerbated by counsel who are going to think; well I don't have to give all that I need to because I'm going to get paid the same. It's not going to matter, it won't matter. I'm going to get paid the same. I've got to dispose of a certain number of cases this year and guess what if I don't dispose of them this year I got paid for it but I got next year too. B1 serious felonies rarely get disposed of in one year. That comes from experience. Rarely happens. That natural tension and don't think that the other side doesn't know about that either because I can tell you anecdotally the message has been well if you don't want that plea we'll line you up to try your case and take a week of your time to try a serious matter. Where is the incentive for the lawyer to do that? Other than his own sense of integrity.



The cost just won't work, it won't work. The final slide, members is the cost of breaking Gideon's Promise. I just told you what it is; the bigger picture the cost is what will happen to the rest of the perception of the criminal justice system. But if you want to look at it in terms of dollars and cents those cases there that are set forth have this theme in common: flat rate contracts and inadequate funding equals a deprivation of your constitutional right to effectiveness of counsel. There are cases up there that put an absolute stop on death penalties because counsel was inadequately funded. What happens when it comes back and the client says or the defendant says my lawyer wasn't any good, he didn't do the job because he wasn't adequately funded? Then we have to pay for that too. Increased incarceration costs of course is obvious. The less vigorous the representation the more obvious chance there is for incarceration and that will go up as well. That's just your back pocket but if you think of it in terms of exactly what it means to have adequate representation it means that the security of each one of us depends upon it. That means adequate funding. And as the current budget is right now for the IDS and is just not going to happen. Madam Chairman and ladies and gentlemen, thank you.

Chairman Hurley: Thank you Colonel Payne. Any questions for either gentleman?

Representative McNeill: I apologize, I know everybody is wanting to get out of here but I know there's been a lot of talk about how we're going to pay the attorneys and I understand that but there's been very little talk about the other side of the equation and that's how we decide who is indigent. Who's going to get this service? Are you satisfied that the process or the guidelines that we're currently using to decide who is indigent is adequate, are people getting it that shouldn't be getting the service and then also, I know you touched on recoupment just a little bit, I'm concerned maybe even under the current system recoupment is not done adequately and I agree with you probably under this system it may even get worse? Is there anything that can be done to increase recoupment and then also I may have to get staff to do this but I'd like a breakdown of recoupment per district?

Thomas Maher: If you don't mind I'll start with your last set of questions and then go back to the first. We actually track recoupment by county because one of the things we're concerned about is there recoupment that we're not collecting? It's an important part of our budget. And in terms of what the Legislature can do, one thing that's occurred to me and I know this happens in other states, currently recouping is set on the value of the services. For a lawyer who billed by the hour the judge would generally take what they paid the lawyer and order recoupment. For public defenders, public defenders report their hours although they're not paid by the hour, and the judge would use the hourly basis because two-thirds of our cases are done on an hourly basis. In terms of setting the amount that was probably a decent system. As we move away from that what I would suggest we be considering is setting a schedule for case types so that in essence it doesn't matter whether the lawyer is doing a good job or bad job reporting their hours or seeking it. We know that somebody facing a C Felony this is the standard recoupment. Some may overpay and some may underpay but given how little we're paying the lawyers the rates are pretty reasonable and if we want to counteract the risks of recoupment going down in this system that's the only alternative I can think of. I know in some states they do that. Throughout they may pay the attorney under one system and recoup under another and the idea in general it's a wash but there's administrative benefits. What we do is when we see problems or what we think are problems with recoupment we often will contact the local district sometimes it's an issue with judges getting paperwork to clerks, sometimes it's judges quite frankly who see the



finer and costs who may be reluctant to order recoupment. And then some of it is our ability to collect recoupment. You know people pay it when they're on probation if at the end of that if they haven't paid it there can be a civil judgment and we collect when they get a state tax refund and I've always found this somewhat ironic when they win the state lottery. Now we actually get some lottery winnings occasionally. But the collection, now there's a delay and it's sometimes hard to know in a given year why our collections are what they are because they may be from cases that were years old on that. On your first question about indigency screening, I think the answer is our system is adequate but adequate may not be as good as it could do. Part of that goes with the recoupment equation if right now a judge for example airs on the side of appointed counsel to somebody who's marginal and that persons convicted, they're more likely to be able to pay the recoupment. So it may well be that the people who we could screen out if we were harder or more rigorous on indigency are the ones who are paying most of the recoupment and I can't prove that scientifically but the people who could probably maybe pay for a lawyer are the ones more likely to be able to pay back the state for that lawyer's fees which is generally much lower than a private lawyer would charge. We have spent a great deal of time looking how various states do it. There are a number of states that have come up with formula most of which have exceptions that probably follow the rule but for example you could say are you at 200% of the poverty level or whatever? The problem is that there are so many different costs for different case types that coming up with kind of concrete examples that are more than guidelines is difficult and of course the local bar charges different amounts in different districts and our sense is that most judges do a pretty good job in figuring out whether this person could have hired one of the local lawyers or not. We certainly could work on more concrete standards but I'd be reluctant to say that you actually see a significant difference in the indigency rates. Because I think our rates are comparable to states which have tried kind of mathematical formulas which can be very hard to implement.

Representative McNeill: Just a follow-up comment. I appreciate your answer and everything like that and Mr. Payne's plea there but I also realize that if you flood too many indigent people into the system those that maybe really don't deserve it are also having an impact on those that really do.

Thomas Maher: You're absolutely right. I mean, part of the issue of how you fund indigent defense is how big a pool you're funding. Not just how much money you spend. I understand and obviously that was part of the reason for reclassifying Class 3 misdemeanors is the notion is to take those out of that system. I absolutely agree. It's a more complex answer I think than some people might like because it's actually a fairly complex issue.

Representative Stevens: One, I'm still confused at how you are paying these people on a regular basis. You enter into a contract for them then you set up a monthly fee whether they've taken the cases or not?

Thomas Maher: Yes and no. They, that's why we track. Every month they have to tell us whether they've taken cases. If they're not taking cases we look into why they're not taking cases. We know for example that somebody has one misdemeanor contract should be getting about ten cases a month. If at the end of the month they say I want to be paid and I've taken no cases we're going to look into that. So far that has not proven to be a problem. People are getting the case loads, at least the case loads they are expected to get but that's why they don't



get paid until they've certified that they've told us what cases they've been assigned not just the ones they've disposed of.

Representative Stevens: So then do you pay them for the ten cases they took that month or is this a pay scale that is already determined for the two year period and it's divided in equal increments each month?

Thomas Maher: The second. A set amount because some months they may get say back to the misdemeanor they may get eight one month and twelve the next. What they know is that the month where they feel like they got too many cases is offset by the month where they got fewer but that each month they know the check is coming in and we know that over the life of the contract they will do the total number of cases that we've paid them for.

Representative Stevens: Is the fee the same in Surry County as it would be in Wake County?

Thomas Maher: Yes. Now one of the things that happens is in some, and we look at the case loads by county when we're setting them and we try to take into account the extent we can kind of local stuff, it may be that Surry County the lawyers resolve 105 cases and in Wake it turned out to be 110 but we don't adjust. One of the things we've found out, while obviously there's different efficiencies in different districts, those come and go and we also don't want to for example and I hate to say this, if there's a local district bar that isn't being terribly efficient we don't want to kind of build in extra pay that rewards their inefficiency. We kind of want to encourage efficiency.

Representative Stevens: As you were setting up this system, as you looked at these cases, I do have some of the same concerns Mr. Payne brought forth. You know I've got a real concern on whether we're going to provide effective assistance counsel.

Thomas Maher: The answer, we've spent a huge amount of time trying to figure out what an average was and how to pay people fairly and what we found it is that there can be a B1 felony that takes ten hours and a lower lever felony that takes fifteen and the best you can look at is averages which is why we've built in this extraordinary case policy because if in fact you've got to try a difficult case and it's clearly outside the average you can come to us and we'll say well fine we're reducing your case load by a case or we're paying you a little bit extra so that that pressure won't be there. If you don't pay people by the hour you have to find a system that in essence predicts workloads and predicts pay based on that. We've tried to build in a safety valve for the case that can't fit in the average and you can't predict.

Representative Stevens: One last question. I'm looking specifically up here at the Simmons v. Public Defender Case and its Iowa Supreme Court, of course it's not binding on us but they've already determined that a hard cap on a compensation basically undermines effective assistance of counsel. Are we going to run into that same problem here?

Thomas Maher: Well, as I said I hope not, is the answer. It's a system that's relatively new but it's been in place for a year in Wake and Durham and the 9th District, but that is quite frankly one of the reasons for the extraordinary case policy which it says that that isn't a hard cap, and in fact in this case involved a system for appellate representation. And we would be happy to provide copies of any of these cases to people but basically the court said you've got to have the ability to recognize that in a given case the cap isn't appropriate and to pay more than that. We've tried to build that into our system to avoid that very problem.

Representative George Graham: I had a concern dating back to earlier discussion that we had and in the interest of time I would leave the request to staff and maybe we could deal with it at



some other time. I'm concerned about we have an ABC State Board, we have local ABC organizations at each of the county levels which means we probably got 100 local ABC agencies at the local level and both the state boards and the local boards are responsible for how those receipts are utilized within the county. Some place it in Mental Health, public health, homeless shelters, control of those dollars are local entities and listening to our discussion I'm concerned that before we go there we need to maybe have some collaboration with the State ABC or with some of the locals as well as law enforcement, sheriffs and police chiefs as to how those dollars are used and if they're being utilized properly.

Chairman Hurley: That's what we discussed and I think we're going to have all of that involved in a later meeting.

Representative George Graham: Thank you.

Chairman Hurley: I do have a question. On the contracts that are being done, they're on all kinds of cases or just misdemeanors or low felonies?

Thomas Maher: At this point, Madam Chair they're for all adult non-capital criminals so they cover misdemeanors, all types of misdemeanors and all types of non-capital felonies. We've divided the felonies into low-level felonies and high-level felonies. But we cover all non-capital adult trial level work.

Chairman Hurley: Okay to keep from having all that other stuff that's happening could we not go to misdemeanors; would that help in what we're doing? I'm just questioning, I don't know.

Thomas Maher: The answer is I'd have to give you a more thoughtful answer. In some respects misdemeanors because they're more voluminous and there's probably less variation in time may be an easier than for example the high-level felony where somebody with a B1 Felony could end up being resolved in ten hours or one hundred hours. I mean I may be dating myself but when I first started practicing, the Little Rascals Daycare Case was going on and that was an appointed case that took like a year and of course you couldn't have a contract system where at the end of that you said thanks for doing one case you owe us twenty more. The higher you go on the seriousness the more likely there is to be extreme variation in cases that aren't made up by some other easier case.

Chairman Hurley: Okay to protect the state, I was just you know, from what I'm hearing you know, I thought the simpler the better for contracts it seems. But that's just me. Anyone else have any comments or questions?

Senator Goolsby: I wish that Representative Daughtry was still here and that Senator Newton was here. Has Leo left? Because we worked at the beginning to try to come up with this and this was sort of a number of people and I sort of want to discuss the initial theory that we had I think on trying to put this together and direct Mr. Maher and the folks at IDS to come up with this contracting system. And the way that I had envisioned it is that it would be a system where what you said about the kinds of cases like DWIs or assaults and all and being able to look at those and have attorneys in local areas contract to be able to do that to help reduce the cost so we didn't have to have as many full-time government lawyers with IDS doing the work in those cases that easily be contracted. And now I talk to Colonel Payne who's right across the county line from me over in Brunswick County about the problems that he's seeing and the fears that he has and I heard you James about and I'm very concerned about if this thing gets fully implemented that we're going to have literally almost capital cases, you know B1 felonies that are looking at you know a potential reimbursement of \$1,000 or 1,100 bucks. I am worried also



about the quality of an attorney that we're going to get and I feel like you guys are trying your best to implement the rules we gave you but something has broken down somewhere along the way, either the law was written poorly, we didn't give enough direction on how it's to be carried out, but I am really concerned about where we're going. It's one thing to try and save money and I'm all for that and I know that everybody in this room wants see our state tax dollars well spent but on the other hand I really concerned as Sarah has pointed out also, Representative Stevens, that we're going to run up against some constitutional things, as Colonel Payne said worried about trying to find adequate lawyers to do this kind of work. And you know we want to save money but I just feel like things are spinning out of control here and we've got to figure out some way in this interim to move this back in and I just wondered, Colonel Payne what do you potentially see as something we can do now to try to address this before we start having critical problems with attorneys either not taking cases or people not working the cases they need to be worked and we start seeing motions for appropriate relief or ineffective assistance of counsel filings and all, what can we do?

James Payne: Senator, the way the law is written now we at IDS are doing everything that we are doing pursuant to the legislative mandate. The only, the only remedy from my perspective in doing this in the trenches just like you Senator, is you're going to have to pay counsel adequately and that means that you're going to have to move away from paying them per contract and do it on an hourly rate. I don't see any other way around it.

Senator Goolsby: Well, the initial thoughts here were not here as Madam Chair said, you know the low-level misdemeanors, these cases that are plentiful the ones where it's easy to know you know if it's a DWI you pretty much know how much time it's going to be on average, you might have an extraordinary case every now and then if there's a motor vehicle death with it but then that would be probably a higher level, maybe a felony thrown in with it, it would fall out of that range. But being able to have IDS contract with attorneys who are going to be in court anyway and if you take five more cases a week that's twenty cases a month we'll pay you X number of dollars, I mean that was the initial thought we had, not to start breaking it down into what we've come up with where we really do start running into the ability for somebody to contract themselves to things they don't really fully understand and then truly run out of time and it be a situation where we've got ineffective assistance of counsel problems. Do you think it's workable to roll it back some and look at what I initially envisioned this thing to be?

James Payne: Yes Senator I would say that it's certainly is more workable and I think Mr. Maher touched on that when you've got a higher level and you're in district court which is where your misdemeanors are, you're in district court anyway so that's within your wheelhouse on a daily basis but if you think about going forward if you then throw in low-bid contracts, who's the lowest bidder on contract for serious cases or even capital cases, you're asking for a nightmare, you're asking for our system to be in havoc quite frankly, so yes I would say that on the lower level it's a lot more manageable. Yes sir.

Chairman Hurley: Any other questions for either gentleman? Thank you so much, okay no other questions, no other discussions. I hope you have a Merry Christmas.



There being no further business, the meeting adjourned at 4:15 p.m.

Representative Pat Hurley
Presiding

Deborah Holder, Committee Clerk

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